95-616

No. 95 -

Supreme Court, U.S.
FILED
OCT 16 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

APPENDIX 2 TO PETITION FOR WRIT OF CERTIORARI

APPENDICES R-1 - BB

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
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Counsel for Petitioners

187 pp

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APPENDIX R-1

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
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Telephone: (916) 324-5281
Counsel for Petitioners

ATTORNEY GENERAL LETTERHEAD

July 29, 1994

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on Habeas Corpus
No. 92-15828

Dear Ms. Catterson:

I am in receipt of a letter to the court from appellant Phillips' advisory counsel, Mr. Donald J. Horvath regarding the issues to be covered at the upcoming oral argument calendared for October 11, 1994. Contrary to the assumptions of Mr. Horvath and appellant Phillips, I am presuming that the oral argument will be limited to the three questions posed in the Order to Show Cause of December 2, 1993, the only issues briefed before this Court in this case. If I am incorrect, please advise me.

In this regard, as to question two, at oral argument I wish to cite the recent decision in *Stanley* v. *California supreme Court*, 21 F.3d 360 (9th Cir. 1994), 94 DAR

667, filed April 12, 1994, amended May 18, 1994, which cites to *Sherwood* v. *Tomkins*, 716 F.2d 632 (9th Cir. 1983).

Sincerely,

DANIEL E. LUNGREN
Attorney General

/s/

EDMUND D. McMURRAY
Supervising Deputy
Attorney General

EDM:gmm

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips on Habeas Corpus

No. 92-15828

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

LETTER TO CLERK - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, Ca 93722

Richard Lewis Arnold Phillips
P.O. Box C - 13707
San Quentin State Prison
Tamal, Ca 94964

Daniel Vasquez, Warden
San Quentin State Prison
Tamal, CA 94964

Each said envelope was then, on July 29, 1994, sealed and deposited in the United State mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1994, at Sacramento, California.

/s/_____
DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
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PETITION FOR WRIT OF CERTIORARI

APPENDIX R-2

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
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Counsel for Petitioners

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX:
(209) 276-3248 (LETTERHEAD)

28 August 1994

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on habeas corpus; No. 92-15828

Dear Ms. Catterson:

This is a reply to attorney Edmund McMurray's letter of 29 July 1994.

Sherwood v. *Tomkins*, 716 F.2d 632 (9th Cir. 1983) does not compel conclusion that petitioner cannot pursue his federal habeas corpus petition attacking the adjudication that he committed murder with special circumstances until his state appeal from the imposition of the death penalty has been decided.

This court stated the grounds for its *Sherwood* decision as follows:

> "[E]ven if the federal constitutional question raised by the habeas corpus petitioner cannot be resolved in a pending appeal, that appeal may result in the reversal of the petitioner's conviction on some other

ground, thereby mooting
the federal question."
(716 F.2d at p. 634.)

Here, petitioner's appeal from the death penalty cannot result in the reversal of his conviction of murder with special circumstances because all guilt issues have long been final in state courts. Since the rational for the *Sherwood* decision does not exist in this case, *Sherwood* is not determinative of this case.

Stanley v. *California Supreme Court* ___ F.3d ___ (9th Cir. 1994), 94 DAR 6670 is not at all on point. *Stanley* merely cites *Sherwood* for the general proposition that state claims must be exhausted before habeas corpus relief may be sought in federal courts.

The relevant cases are those which have applied the mandate of *Rose* v. *Lundy* 455 U.S. 509 and recognized that absent some compelling reason for delay a state prisoner has an election to pursue his exhausted federal issues on federal habeas corpus whenever the petitioner decides to do so. (*Peoples* v. *Fulcomer* 882 f.2d 828, 832 (3rd Cir. 1989); *Reynolds* v. *Ellingsworth* 843 F.2d 712, 724, fn. 22 (3rd Cir. 1988); *United States* v. *Peters* 780 F.Supp. 1183, 1184 (N.D. Illinois 1991).

Sincerely yours,

/s/
Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
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PETITION FOR WRIT OF CERTIORARI

APPENDIX S

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
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Telephone: (916) 324-5281
Counsel for Petitioners

LETTER

RICHARD L.A. PHILLIPS
C-13707 3-E-111
San Quentin State Prison
San Quentin, California
94964

15 February 1995

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 Spear Street
San Francisco, CA 94105

Case No: 92-15828

ATTN: CATHY A. CATTERSON, Clerk of the Court
JERELDINE CURTIS, Senior Deputy Clerk
B. FLETCHER, Presiding Justice of the Panel

The purpose of this letter is to request that I be allowed to submit the enclosed as post-hearing briefing.

On 11 October 1994, after participating in oral arguments telephonically, I set a letter to Ms. Curtis regarding the problem of hearing what was being said. This was due to the prison's telephone equipment being half-duplex (cheap) and the court's system being full-duplex (high quality).

The clerk of the aforementioned proceedings made me a copy of the tape of the proceedings, and gave it to advisory counsel, Donald Horvath. Mr. horvath in turn sent it to me via the Legal Affairs Coordinator here at San Quentin. I was finally allowed to review this tape (though not retain it in my possession, as it didn't come from an approved vendor?!!?).

After reviewing these tapes, I realized just how much of the proceedings I did NOT hear. My "supplemental briefing" speaks to the issue of delay which Justice Kleinfeld asked about.

Thank you for considering this request.

Sincerely,

/s/
R. PHILLIPS

cc: Mr. Horvath, Advisory Counsel
Mr. McMurray, Asst. Attorney General
Mr. Calderon, Warden

DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
P.O. Box C-13707
San Quentin, CA 94964

DONALD J. HORVATH, Esq.
Advisory Counsel by
Appointment of the Court
4441 W. Herndon, Suite 6
Fresno, CA 93722

(209) 276-3248

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	Case No. 92-15828
Petitioner,	)	SUPPLEMENTAL BRIEFING TO ORAL ARGUMENTS OF 1 OCTOBER 1994
v.	)	
A. CALDERON, Warden, San Quentin State Prison,	)	
Respondent.	)	

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Petitioner RICHARD LOUIS ARNOLD PHILLIPS respectfully seeks inclusion of the following supplemental briefing to the oral arguments

on 11 October 1994, subsequent to Petitioner's review of the audio tapes of the aforementioned proceedings.

Subject: Delays in this case.

I. BACKGROUND

A. The offense in this case occurred on 7 December 1977. (Approximately 30 days after California reinstated the death penalty.)

B. The case was tried to a jury beginning 22 January 1980.

C. The sentence of death was pronounced on 20 February 1980.

D. The California Supreme Court reversed as to penalty on 31 December 1985; and affirmed the convictions upon the guilt phase and finding of special circumstances.

E. After filing several writs of habeas corpus with the trial court, then exhausting fully through the California Judicial system, on 14 March 1992, Petitioner was again sentenced to death.

II. THE ATTORNEYS

A. Paul Martin (now Presiding Judge, Madera County), by appointment of the court, conducted the first trial.

B. Frank Berry and Paul Myers III, by appointment of the California Supreme Court, represented Petitioner on automatic appeal.

C. In Mid-1986, Thomas Mills was appointed to represent Petitioner on retrial as to penalty.

D. John Barker was appointed by the court, upon petition of Thomas Mills for second counsel.

E. E. Marshall Hodgkins III replaced Mr. Barker, when Mr. Barker petitioned the court to be removed from the case.

F. Katherine Hart became second counsel, with Marshall Hodgkins becoming lead counsel, after it was discovered that Mr. Mills was related to Petitioner's co-defendant.

G. In mid-1989 Petitioner filed to

proceed *pro per*, as second counsel, with Katherine Hart as lead counsel.

III. THE JUDGES

This would take too long to detail. Suffice to say that between 1986 and 1992 there were in excess of 12 judges involved in the case.

All judges in Madera County disqualified themselves due to Paul Martin being their PJ.

Numerous judges were brought in from adjoining Fresno County to conduct various pre-trial hearings. All eventually disqualified themselves.

Finally, the California Judicial Counsel stepped in and appointed Bert Bailey. Judge Bailey issued an Order to Show Cause on Petitioner's first writ of habeas corpus. Judge Bailey committed suicide before an evidentiary hearing could be conducted.

After several starts and stops, the California Judicial Counsel again intervened, appointing retired Judge (Lake County) W.J.

Harpham. Judge Harpham conducted evidentiary hearing, per Judge Bailey's order, then denied this writ; granted Petitioner *Pro per* status, ruling that this was NOT for purposes of delay; denied Petitioner's second writ; conducted penalty phase retrial; and imposed sentence of death.

IV. DISCUSSION

Prior to filing of automatic appeal, Attorneys Berry and Myers visited Madera. They met with the prosecutor, trial attorney, court, and sheriff's investigators. At each meeting they were given exhibits, papers, photos, tapes, etc. They did not tag each item as it was given to them.

A. THE FIRST WRIT

After filing Petitioner's automatic appeal, conducting oral arguments, and receiving a decision, attorneys Berry and Myers gathered up all items they had been given, pertaining to the case. Their intent was to label them for storage. While

conducting this inventory, they discovered a cassette tape that neither had previously reviewed. Listening to the tape, attorneys Berry and Myers realized the information therein was obviously exculpatory. Berry and Myers immediately scheduled an attorney/client visit at San Quentin, and played the tape for Petitioner. (See declaration of Paul Myers III before 5th Circuit Court.)

In 1986, upon appointment of Thomas Mills as counsel for Petitioner's penalty phase retrial, Mr. Mills came to San Quentin to meet with Petitioner. At that time petitioner apprised Mr. Mills of the existence of a tape which Petitioner had never heard until such time as attorneys Berry and Myers had played it for him.

Attorney Mills brought in Ed Mulvihill, a licensed investigator. (Before becoming a private investigator, Mr. Mulvihill had been an investigator for the Madera County

District Attorney's Office.)

Mr. Mulvihill was assigned the task of gathering all police files and relevant documents, etc. Upon arrival at the Madera County courthouse/district attorney's office, Mulvihill asked to see the files pertaining to Petitioner. He was told everybody was on vacation, but the items in question were "in a Rice Krispies case in the back closet." mr. Mulvihill was given free access to the room and copying machine. He copied everything he could find pertaining to the case at bar.

Investigator Mulvihill then contacted original trial counsel Paul Martin (now a judge), and made arrangements to retrieve Martin's files on Petitioner's case.

Setting the police reports and relevant documents covered under orders for discovery during the previous trial, on the "kitchen table," Mulvihill couldn't understand why the stack he had photocopied was so much thicker

than the ones which Paul Martin had given him. Upon detailed comparison, Mulvihill discovered he had 324 additional pages from the district attorney's files, which were not in the files of Judge Martin. (See testimony of Investigator Mulvihill on January 4 & 5, 1990.) Included in these papers were the transcript of the tape Petitioner nor Martin had ever heard prior to original trial.

When Petitioner filed to proceed as second counsel, Judge Harpham stated in relevant part:

> "The Court would further find as a result of this hearing, after having read the cited references, this is NOT a request in order to attempt to delay or prevent the orderly processes of the Court and in view of the comments, the Court does find also., I really believe the defendant has been acting as co-counsel for some years." (Emphasis added.)

At the hearing wherein Judge Harpham granted Petitioner pro per co-counsel status, Petitioner informed the Court he would be filing a second writ of habeas, just as soon

as he could prepare the documents. Again, the Court was aware of Petitioner's agenda, and did NOT find it was for purposes of delay.

B. THE SECOND WRIT

During a subsequent discovery hearing, the Madera County District Attorney falsely stated to the trial court that it had no idea what happened to the victim's vehicle. (The vehicle was the ENTIRE crime scene.)

Petitioner's efforts as co-counsel, from his jail cell, uncovered the fact that the prosecution:

1. Caused the vehicle to be towed to the California Department of Justice crime lab;

2. Caused the vehicle to be destroyed without notifying Petitioner or his counsel.

And of course the reports from the tow truck operator, the Department of Justice, and indeed even the Madera County Sheriff himself, were never given to the defense, are no where to be found!

Petitioner made a *prima facie* showing that he could in fact meet the stringent guidelines of *Youngblood*, but was denied an evidentiary hearing.

C. THE RETRIAL

Even after the penalty phase retrial, the trial court saw a need to grant additional time for filing a Motion for New Trial. This extension was for the purpose of locating the former police officer who would testify the prosecutor knowingly introduced false evidence; and also because the prosecutor attempted to mislead court appointed counsel for a defense witness.

D. THE SECOND AUTOMATIC APPEAL

Advisory Counsel Horvath now represents Petitioner before the California Supreme Court on automatic appeal.

Both Advisory Counsel Horvath and Mr. McMurray for the state, referred to the numerous errors in the penalty phase retrial transcripts. This despite precautionary

steps of Petitioner in the form of successfully petitioning the trial court to tape record the entire proceedings.

During 11 October 1994 oral arguments Mr. Horvath represented to this Court he is encountering total disarray when proceeding to the Madera courthouse to review the record. Information is stuffed into (unmarked) manila envelopes, etc.

What both parties failed to mention was the segment of record which reads: "Transcripts unavailable for this hearing. Court reporter lost her notes."

IT SHOULD BE NOTED most inmates sentenced to death in California wait for appointment of appellate counsel for an average of 4+ years. Had I not affirmatively sought counsel, the second automatic appeal wound not have yet begun.

V. CONCLUSION

If this paints a picture of documents thrown into a Rice Krispies box, stuffed into

a back closet - of missing evidence and police reports - of police reports stamped that they were NOT given to the defense by the prosecution, but supposedly by the sheriff's office - of missing reporter's notes - of disappearing lab tests - then you're starting to see the root of the ongoing delays in this case. (And I didn't even go into the California Supreme Court STILL being unable to account for the original exhibits from the first automatic appeal.)

The trial court found that the delays in this case were NOT the result of efforts by the defense to drag it's feet.

This case will become MORE, not less, convoluted with the passage of time.

DATE: 15 February 1995

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

VERIFICATION

I am the petitioner in this action. All facts alleged in the above document, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

All documents referred to are available for review upon request.

I declare under the penalty of perjury that the above is true and correct and that this declaration was executed on 15 February 1995 at Death Row II, San Quentin State Prison, San Quentin, California.

DATED: 15 February 1995

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS,	)	Case No. 92-15828
Petitioner,	)	
vs.	)	
ARTHUR CALDERON, Warden	)	
Defendant.	)	

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

REQUEST TO SUBMIT POST-HEARING BRIEFING

upon the interested parties by placing a true and correct copy thyerof in an envelope and sealing same, postpaid and by depositing same for delivery in the United Staes mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of

outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 16th day of February 1995 in San Quentin, California.

/s/_____
RICHARD L.A. PHILLIPS
pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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PETITION FOR WRIT OF CERTIORARI

APPENDIX T

DANIEL E. LUNGREN
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Chief Assistant Attorney General
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EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

LETTER

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX: (209) 276-3248

4 April 1995

Ninth Circuit Court of Appeals
P.O. ox 193939
San Francisco, CA 94119-3939
Att: Donald Lewis

RE: Richard Phillips on habeas corpus; 92-15828

Dear Mr. Lewis:

Pursuant to your telephone request, I am enclosing docket sheets from the Madera County Superior Court for petitioner's murder trial and the Fifth District Court of Appeal for the two habeas corpus petitions filed in that court--case numbers F014410 and F016509.

Please note that the Fifth District docket in action no. F014410 indicates the dates of action by the California Supreme Court upon the petition for review filed in that court. When considered with the factual pleadings in the habeas corpus petition under review. (see, Federal Habeas Corpus Petition, p. 9) this information may satisfy the court's need for additional information.

Petitioner filed an original habeas corpus petition in the California Supreme Court raising the same issues presented in action no. F016599 rather than a petition for review of the Fifth District denial of relief in that action. (See, Federal Habeas Corpus Petition, p. 12.) Therefore, the Fifth District docket for that case does not show anything regarding the original petition filed in the Supreme Court.

Please return a conformed copy of this letter so I will know you received it.

Thank you.

Sincerely yours,

/s/

DONALD J. HORVATH

cc: Richard Phillips
Attorney General, without enclosures

No. 95 -

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APPENDIX U

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
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EDMUND D. McMURRAY
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Telephone: (916) 324-5281
Counsel for Petitioners

LETTERHEAD

Donald J. Horvath
Attorney at Law
4441 W. Herndon, Ste. 6
Fresno, California 93722

Phone & FAX:
(209) 276-3248

(FILED Madera County 95 Mar. 31 pm 3:00,
Rebecca Martinez, County Clerk Deputy

29 March 1995

Ms. Rebecca Martinez
Madera County Clerk
Government Center Building
209 W. Yosemite
Madera, CA 93637

RE: People v. Richard Phillips;
Superior Court No. 4852

Dear Ms. Martinez:

I have been appointed to represent Mr. Phillips upon his appeal for the death penalty imposed in this case. I am also appointed as advisory counsel for Mr. Phillips in federal court.

The Ninth Circuit Court of Appeals has requested me to supply the court with a docket of the trial court proceedings in this case--a chronological listing of documents and orders filed in the trial court. I believe you call this document a register of actions.

Please send me a copy of the entire register of action (docket) for this case

showing all document a register of actions.

Please send me a copy of the entire register of action (docket) for this case showing all documents filed from start to finish.

I have enclosed an envelope for this purpose.

Thank you.

Sincerely, yours,

/s/

Donald J. Horvath

No. 4852
THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiffs

vs.

Richard Louis Arnold Phillips
Defendant
(Cont. from Vol. 12 page 486)

Date 1986	PROCEEDINGS
2-24-86	Clerk's Notice - Hearing set on Remittitur 3-7-86 at 8:15 a.m.
3-3-86	Order Authorization Temporary Removal of Prisoner
3-7-86	MO - Mr. Mills appt as counsel for deft. Deft waives time. Trial setting to be set for 2 hours
3-7-86	MO - 2 hr hearing on trial setting is set for 4-11-86 at 1:30 p.m. before an outside judge
3-7-86	Letter from defendant
3-7-86	Request to conduct media coverage and order
3-14-86	Petition and order sealed by order od court
4-8-86	Order authorization, temporary removal of prisoner 4-11-86
4-11-86	MO - Court sets 2 week jury trial - 10-27-86 at 9:30 a.m. Trial confirmation 10-10-86 at 1:30p.m. - Custody
4-11-86	Request to conduct film and electronic media coverage and order
5-27-86	Packet of in camera matter - taken Mat 23, 1986 by court

	reporter Faust from Fresno County
7-15-86	Motion for discovery 7-30-86 at 8:00 a.m. (no fee)
7-15-86	Points and authorities in support of motion for discovery
7-15-86	Declaration in support of motion for discovery
7-18-86	In camera motions and M.o. (confidential)
7-30-86	MO - Matter cont to 7-31-86 at 9:00 a.m.
7-31-86	Mo - Motion granted as requested as modified above
8-18-86	Order per pc 987(d)
8-18-86	Order for discovery
9-12-86	Notice of motion for continuance (9-22-86 at 8:00 a.m.)
9-18-86	Order authorizing temporary removal of prisoner
9-22-86	MO - Motion to cont. is granted - Cont. to 3-30-87 at 9:30 a.m. (estimated time of 2 weeks) - Custody
11-22-86	Order of the court - Ordered sealed by the court (confidential)
1-22-87	Motion to compel discovery or, in the alternative, to dismiss case or, in the alternative, to Cont. trial date 1-27-87 at 8:15a.m.
1-27-87	MO - Cont. to 2-28-87 at 8:00a.m.
2-18-87	Stipulation hearing set for 2-20-87 continued to 2-23-87
2-19-87	Order for temporary removal of prisoner

(Cont. to pg 167)

(Cont. from page 155)

Date 1987	PROCEEDINGS
2-23-87	MO - Court grants continuance and vacates trial date assigned (3-30-87) Court sets matter for jury on 5-18-87 at 9:30a.m. (time estimated 3 weeks) trial confirmation set for 5-4-87 at 8:00a.m.
4-9-87	Notice of motion to withdraw as attorney of record
4-10-87	Declaration of counsel in support of motions
4-10-87	Notice of motion and motion to exclude nonstatutory aggravating evidence. - Apr. 30, 1987 at 8:00a.m., Dept. 1
4-10-87	Notice of ancillary motion in regards to writ of Habeas Corpus, - Apr. 30,1987 at 8:00a.m.
4-10-87	Notice of motion to suppress evidence - Apr. 30, 1987 at 8:00a.m. Dept. 1
4-10-87	Notice of motion to sequester jury, in limine, that the public be security searched, that all witnesses be excluded, for a daily transcript and interrogatories on a commission. Apr. 30,1987 at 8:00a.m. Dept. 1
4-10-87	Notice of Motion to exclude evidence, Apr. 30, at 8:00a.m. Dept. 1
4-10-87	Notice of motion and motion to strike the death penalty as disproportionate and points and authorities in support there of - Apr. 30,1987 at 8:00a.m., Dept. 1

4-14-87	MO - Court orders Def. to returned for Marsden Hearing on 4-22-87 at 8:00a.m.
4-16-87	Order for temporary removal of prisoner
4-22-87	MO - Court grants Barkies motion to be relined - Trial date vacated - Def waives time for trial - Matter cont. to 4-23-87 for appointment of counsel- Custody
4-23-87	Order granting attorney's motion to withdraw
4-23-87	MO - Per agreement of counsel, 3-4 week jury trial on 9-14-87 at 9:00a.m. - Trial confirmation on 8-31-87 at 8:30a.m. - 1 day hearing and 8-7-87 at 8:30 - 1 day hearing- Marshall Hodgkins is appointed as counsel for Def. -Custody
5-27-87	Order appointing second counsel pursuant to section 987(d) p.c.
6-12-87	Clerk's notice - Motion for reconsideration of trial date scheduled for hearing on 7-1-87 at 8:00a.m. of courts own motion

(Cont. to pg 168)

(Cont. from 167)

Date 1987	PROCEEDINGS
6-30-87	Letter from Def. dated 6-23-87
7-1-87	MO - (Trial date assigned vacated and T.C. on 8-31-87) orders this matter cont. to 8-7-87 at 8:00a.m. motions and trial setting (7-24-87 motions are vacated)
7-30-87	Letter from Def. dated 6-23-87
7-17-87	Motion of evidence to be introduced in aggravation of Penalty trial (§1903 p.c. as of 12-7-77)
7-17-87	Points and authorities in opposition to motions 1) to suppress evidence of letters and telephone communications 2) to exclude evidence of vehicle 3) to exclude "non-statuary aggravating evidence" 4) to strike Death Penalty 5) to exclude photographs of victims and to prohibit witnesses from discussing case 8-7-87 at 8:30a.m.
7-24-87	Transportation order
7-24-87	Transportation order
8-7-87	MO - matter set for trial on 2-22-87 (2 wks 9:00a.m. Trial confirmation set for 2-08-87 at 8:00a.m. hearing on) Motions set for 11-13-87 and 12-4-87 at 8:00a.m. for 1 day hearings Attorney is allowed to respond by 10-1-87 - Ruling to be on first motion date of 11-13-87 - Custody
11-13-87	MO - Court cont. to 12-4-87 at 8:30a.m. and for further hearing on any motion on 1-15-88 at 8:30a.m. for a 1 day

	hearing - Custody
11-20-87	Transportation Order
11-20-87	Transportation Order
12-4-87	MO - Motion to exclude writs is granted - Court denies regrant to exclude photos - Reg #8 granted - #10 granted - ct. denies any further hearing for motions to suppress. Next hearing is 1-15-88 at 8:30a.m.
12-21-87	response to notice of ancillary motion
12-28-87	Transportation Order
1-14-88	Request to conduct film and electric media coverage and order
1-15-88	Mo - Motion to Cont. trial - Jury trial set for 5-16-88 at 9:00a.m. Trial confirmation set for 5-2-88 at 8:00a.m. (4 wk trial) (primisance date is vacated - Custody (Court order transcript of today's hearing (within 30 days))
1-25-88	Ruling Re. Ancillary motion to writ of habeas Corpus
1-27-88	Motion (court report prepared)

(Cont. to 169)

(Cont. from 168)

Date	PROCEEDINGS
4-8-88	Petition for writ of Habeas Corpus (no hearing date set)
4-8-88	Declaration of Richard Louis Arnold Phillips
4-8-88	Memorandum of points and authorities in support of petition for writ of Habeas corpus
4-18-88	Notice of motion and motion for continuance pursuant to penal code section 1050
4-18-88	Declaration of G. Marshall Hodgkins
4-18-88	Transportation Order
5-22-88	MO - Ct. sets matter for trial by jury 11-14-88. Trial confirmation is set for 10-31-88 at 8:00a.m. Response to be filed by 5-20-88 Denial by 6-17-88 hearing 7-1-88 at 8:30a.m.
5-25-88	Letter from Richard Phillips dated 4-14-88
5-26-88	Order of the Ct.
5-18-88	Declaration of Paul R. Martin
5-18-88	Return to order to show cause RE. Habeas Corpus
5-18-88	Points and authorities in opposition to petition for writ of Habeas Corpus
6-14-88	Order denying review after judgement by the Court of Appeal
6-17-88	Response to opposition to petition for writ of Habeas Corpus hearing 7-1-88 at 8:30
6-29-88	Letter from Judge Moffat
7-1-88	MO - Court will disqualify self on Habeas Corpus issue - Outside Judge to hear - Matter

	continued to 8-19-88 at 8:30a.m.
7-25-88	Letter to Judge Edward Moffat - dated 7-1-88
8-19-88	MO - (Petition fort writ of Habeas Corpus) Matter continued to 9-15-88 8:30a.m.
8-19-88	order for temporary removal of prisoner
9-15-88	MO - Ct relieves Mr. Mills and appoints Mr. Hodgkins as primary counsel and Miss. Hart as secondary counsel
9-28-88	Order appointing second counsel pursuant to section 987 (d)p.c.
9-28-88	Transportation order: To D.O.C. Co. of Madera
9-28-88	Transportation Order. To : The Warden of San Quentin State Prison, State of California

(Cont to 170)

(Cont. from 169)

Date 1988	PROCEEDINGS
11-18-88	Petition for writ of Habeas Corpus
11-18-88	MO - Counsel for Def. to file points and authorities on or before 12-2-88, D.A. to respond by 12-16-88 - Matter to be taken under submission by court. - Counsel for Def. req. permission to file another writ w/the court and serve the D.A. with writ in open court. Counsel for Def. req. to withdraw confidential writ personally filed by Mr. Mills - Court grants request - Priant trial date of 3-13-89 is vacated - Trial is re-set for 3-20-89 at 9:00a.m. due to change in assignment of judge. Custody
12-2-88	Supplement points and authorities in support of Petition for writ of Habeas Corpus
1-6-89	Ruling
1-6-89	Ruling on Petition for Writ of Habeas Corpus
1-31-89	Request for Judicial Notice
1-31-89	Points and authorities in opposition to petition for writ of Habeas Corpus filed 11-8-88
1-31-89	Return to order to show cause Re Habeas Corpus issued 1-6-89
1-31-89	Declaration of David D. Minier
1-31-89	Proof of Service by mail
2-17-89	Transportation Order: Hearing: 2/21/89 @ 8:00a.m.
2-17-89	Transportation Order: Hearing: 2/21/89/ @ 8:00a.m.

2-21-89	Declaration in Support of Motion to cont.
2-21-89	MO-Counsel for def., E. Marshall Hodgkins III, States the def. will waive time for trial to 7-10-89 @ 9:00 A.M., on that date a trial setting hearing will be scheduled, the trial will be set up to 90 days from the date of the trial setting hearing. Matter is set for Trial Setting 7-16-89 @ 9:00 A.M., Trial date prev. set for 3-13-89 is vacated, Mr. Hodgkins to prepare the order. To have telephone contact w/the D.A. as to form + contact, then to submit to court for signature Custody (State Prison)
2-27-89	Order of the Court
3-01-89	Traverse Pursuant to Rule 260 of the California Rules of Court on Petitioner's Petition for writ of Habeas Corpus Previously filed on 11-18-89
5-10-89	Stipulation of the Parties Regarding Release of Exhibit
6-23-89	Transportation Order

(Cont. to Pg. 171)

(Cont. from pg. 170)

DATE 1989	PROCEEDINGS
July 12,'89	Order RE Petition for Habeas Corpus. (Writ of Habeas Corpus is granted.)
July 13,'89	Transportation Order, to be transported from San Quentin to Madera D.O.C. for hearing set for 7-17-89 @ 8:00 A.M.
July 17,'89	Mo- Mr. Hodgkins is relieved from appointment as lead counsel & is allowed to withdraw. Kathy Hart is appointed as bad counsel- Next Court Dates: Hrg. on Writ of Habeas Corpus on 10-4-89 @ 9:00a.m. to conclude 10-5-89- Status Conf./Trial Setting on 10-13-89 @ 9:00a.m. (Court orders: Def. not to be returned to San Quentin between 10-4-89 hrg. date & 10-13-89 hrg. date- (Custody- San Quentin)
July 17,'89	Order - Judith S. Sachar be appointed as Legal Runner for Def.
July 17,'89	Order - Any duly recognized atty. or investigator shall be allowed to have interviews w/Def. W/out monitoring, taping, etc.
July 26,'89	Hearing Re Trial Setting; Hearing Re Marsden Motion
July 27,'89	Sealed By Order of court -1. Petition for In-camera Hearing 2 Motion 3. Minute Order
Aug. 10,'89	Petition for In-Camera Hearing
Aug. 28,'89	Mo- Court sets matter For Review on 10-13-89 @ 8:00a.m.
Aug. 28,'89	Order
Aug. 28,'89	Transportation Order

Sept. 5,'89	Mo - Per telephone call this date from judge Harpham. The above motion is set for hrg. on 10-13-89 @ 8:00a.m.
Sept. 7,'89	Declaration in support of Madera Housing (Marked Exhibit "B" (1.1))
Sept. 7,'89	Declaration in Support of Appointment of Court Master
Sept. 11,'89	Proof of Service by Mail
9-18-89	Order
9-18-89	Proof of Service by Mail
9-21-89	Opposition to Defendant's Motion for Appointment of Court Master & Points & Authorities in Support 10-13-89 @ 9:a.m.
9-8-'89	Petition for Temporary stay of Order & Reconsideration for Modification or Revolution of Order & Points & Authorities in Support.

(Cont. to pg. 172)

(Cont. from 171)

DATE, 1989	PROCEEDINGS
10-3-89	Transportation Order (from San Quentin to Madera)
10-3-89	Transportation Order (from Madera to San Quentin)
10-3-89	Motion for Discovery 10-13-89 @ 8:a.m.
10-10-89	Transportation Order
10-30-89	Transportation Order (certified copy) (Judge only signed one original)
10-30-89	Transportation Order (certified copy) (Judge only signed one original)
10-30-89	Order Granting Propria Persona Privileges
11-30-89	Ex-Parte Request for Preparation of transcripts
12-5-89	Motion for Story of Proceedings
12-8-89	Temporary Order Pending Petition for Reconsideration
12-22-89	MO- Kuhn files motion for reconsideration- motion for preparation of transcripts is granted- motion to continue Jan. 4-5 hearing is denied - Hearing on Jan. 4th scheduled for 8:a.m.
12-22-89	Motion for Stay of Proceedings
12-22-89	Declaration in Support of Ex-Parte "Confidential filing"
12-22-89	EX PARTE Petition for Temporary Order Pending Petition for Reconsideration
12-22-89	Petition for Reconsideration/Request for Modification of Order granting Propria Persona Privileges.
12-22-89	Motion to continue Habeas Hearing for January 4th 1990

12-22-89	Notice of Motion & Motion for Reconsideration
12-22-89	Declaration of Sgt. Robert Blaze/ Declaration in Support of Motion for Reconsideration.
12-22-89	Declaration of Madera County, Dept. of Corrections Director AL HAHN in Support of Motion for Reconsideration
12-22-89	Office Memo from Harvey Clausen, Board of Corrections RE: Dayroom Furnishings.
1-4-90	MO. Order providing telephone is approved & signed by court. Motions for additional lights Reading lamps is granted to be included in proposed amended order - Motion for possession of Portable recording device is granted to be included in proposed amended Order - Def. files an addendum to Exhibit E previously filed w/Court an 12-22-89 - Granted- to be placed addendum to Exhibits E with Exhibits E.
1-4-90	Motion to Reconsider
1-4-90	Order Providing Telephone

(Cont. to pg. 173)

(Cont. from page 172)

Date 1990	PROCEEDING
1-4-90	Letter from Def. to Judge W.J. Harphem
1-4-90	Decl. in support of Motion for Reading lamps
1-4-90	Notice of Motion and Motion for additional lights (Reading lamps): Declaration
1-4-90	Declaration in support of motion for portable recording device
1-4-90	Notice of motion and motion for possession of portable recording device: Declaration
1-4-90	Notice of motion and motion to recall all proceedings
1-4-90	Letter to attorney Katherine Hart from Def. dated 12-30-89
1-5-90	Mo - Nature of hrg. evidentiary hearing on writ of habeas corpus 2nd day matter is taken under submission by the court - Case is set for trial Setting on 3-23-90 at 9:a.m. - Court orders Def. to be dressed out for further court hrgs. - County counsel to understand that until the over-all order is completed and signed - the orders are to be completed w/forthworth even though not in written form.
1-16-90	Status conference and trial setting - Motion for discovery - Motion for reconsideration on hearing - Reporter's transcripts
1-19-90	Proceedings on writ of Habeas Corpus - Second day of hearing - Reporter's transcript

2-6-90	Writ of Habeas Corpus- Reporter's transcript
2-14-90	Order denying Writ of Habeas Corpus
3-2-90	Amended order grant in Propria Persona Privileges
3-23-90	MO- Trial Setting: Jury Trial 9-4-90 @ 9:a.m. - (6wks) Def. waives time
8-1-90	Order for documents
8-2-90	Stipulation (step between the parties as follows: 1. Item 68 of the amended order granting Pro-Poria Persona Privileges filed 3-2-90 is amended to allow Def. Phillips to be afforded exercise with inmate Benny Galiegos- Both Defs. are allowed to utilize the dayroom at the same time.)
8-8-90	Order to D.M.V. (signed by Judge N.J. Harpham
7-13-90	Ex-Porte request for Preparation of transcripts & documents for Pre-Trial writ petition
8-14-90	Mo- Orders not to disallow retroactive application of Proposition 115- granted- Ct. directs all parties next w/ the court in cambers on 9-4-90 @ 8:a.m. for pretrial conference- (A court reporter will be required at this conference.)

(Cont. to pg. 174)

(Cont. from page 173)

DATE, 1990	PROCEEDINGS
Aug. 17, '90	Order from the Court of Appeal dated 8-16-90: Petitioner is granted lean to file a reply provided it is received by this Court on or before 9-10-90 - Good cause appearing, the penalty trail set for 9-4-90 is stayed pending determination of this petition
10-9-90	Ex-Parte Petition for In-Camera Hearing for Request of Supplemental 987.9 funds
10-9-90	Points & Authorities in support of Petition for In-Camera Hearing
11-19-90	Notice of Motion & Motion to Exercise Peremptory Challenge (ccp § 170.6) (Re: Judge John DeGroot)
12-21-90	Ex-Parte petition for In-Camera Hearing for request of Supplemental 987.9 funds
12-21-90	Points and Authorities in support of Petition for In-Camera hearing.
12-21-90	Order- for camera hrg.: set for 1/4/91 @ 8:30a.m.
1-2-91	Objection/ Statement of Disqualification
1-8-91	Consent.
1-4-91	Mo. In-Camera Hearing: 170.3 motion granted - 987 request will be re-set
2-7-91	Order
5-16-91	Order from Ct. of Appeal
6-17-91	Order from Ct. of Appeal (signed 12-13-90)
6-17-91	Order from Ct. of Appeal (signed 12-28-90)
6-17-91	Order from Ct. of Appeal

	(signed 5-9-91)
6-21-91	Mo.- Jury Trial- 9/16/91 @ 9:30a.m. Hrg. on motions: 8/16/91 @ 1:30p.m. and disc. of trial procedures
6-21-91	Order for medical treatment (Dental)
6-24-91	Letter from Richard L. A. Phillips, dated June 20, 1991.
7-29-91	Notice of motion for reconsideration of ruling Re. Jury selection and motion to remove defendant as to counsel 8-2-91 at 3:00 p.m.
7-29-91	Points and authorities in support of 1.) Motion for reconsideration of ruling Re. Jury selection and 2.) Motion to remove Def. as Co.- Counsel
8-2-91	Motion to discus the District Attorney under Penal code 1428 Aug.16,1991 at 1:30p.m.
8-2-91	Declaration in support od petition for medical treatment
8-2-91	Order for medical treatment (cardiologist)

(Con't page 175)

(Cont. from page 174)

Date 1991	PROCEEDINGS
8-2-91	MO- Hrg. on reconsideration of ruling Re Jury selection and motion to remove Def. as Co - Counsel - Trial set for 9-23-91
8-13-91	Declaration of David D. Mimier in opposition to motion to recuse (8-16-91 at 1:30p.m.)
8-14-91	Motion- Reporters transcript
8-14-91	Attorney General's opposition to motion to recuse Madera County District Attorney's Office. Aug. 16, 1991 at 1:30p.m. - Judge Harpham
8-16-91	MO - Hrg. on mtn. to Recuse Madera County's D.a> ofc. and opposition thereto. Mtn. to recuse is denied
8-16-91	Notice of evidence to be introduced. (Sec. 190.3 P.C.)
8-16-91	Petition for writ of Habeas Corpus.
8-26-91	Motions - Reporter's transcript
8-29-91	Notice of motion for discovery, and points and authorities 9-23-91 at 9:a.m.
9-3-91	Ruling on Writ of Habeas Corpus filed 8-16-90
9-12-91	Declaration in support of petition for additional legal interviewer time/possession of laptop computer.
9-12-91	Order for additional time for legal interviews/authorization to posses laptop computer for trial
9-17-91	Letter to Judge Harpham, dated Sept. 19, 1991 - from County Counsel

9-19-91	Court of appeals: Fifth Appellate District : The petition for writ of habeas corpus is denied
10-1-91	Stipulation and Order
10-1-91	Order
10-2-91	MO - Hovey Voir Dire
10-3-91	Order for haircut
10-10-91	Letter dated Oct. 9, 1991 from County Counsel -
10-16-91	Motion in Limine/ and points and authorities Re. cross examination of Sharon Coleman
10-16-91	Points and authorities Re. admissibility of admission
10-23-91	Order for transcripts
10-23-91	Order compelling attendance of material witness
10-23-91	Order compelling attendance of material witness
10-23-91	Order compelling attendance of material witness
10-23-91	Clerk's notice: Transcripts of civil case No. 42284 shall be prepared as ordered by the court

(document received from chambers, out of order see pages 176 and 177)
(Con't on pg 176)

(Cont. from pg. 175)

Date 1991	PROCEEDINGS
11-6-91	Request for jury instructions. (Penalty phase)
11-6-91	Proposed jury introductions -
11-6-91	Penalty Verdict: Death -
11-7-91	Certification
12-16-91	Motion for delay - Hrg. set for 12-20-91 is con't to 1-10-92 at 8:30a.m. Sentencing set for 1-10-92 to 1-31-92 at 8:30 a.m.
9-23-91	MO - Day one jury selection
9-24-91	MO - Day 2 of jury selection
9-25-91	MO - Jury selection Day three
9-26-91	MO - Day 4 of jury selection
9-27-91	MO - Hovey Voir Dire Continues
9-30-91	MO - Day 6 of jury selection
10-1-91	MO - Day 6 of jury selection
10-3-91	MO - Jury selection day 9
10-4-91	MO - Day 10 of jury selection
10-7-91	MO - Day 11 Jury selection
10-8-91	MO - Day 12 jury selection
10-9-91	MO - Day 13 of jury selection
10-10-91	MO - Day 14 of jury selection
10-11-91	MO - Day 15 of jury selection
10-15-91	MO - Haircut for defendant
10-16-91	MO - Day 18 of jury selection
10-16-91	MO - Jury trial - 1st day
10-17-91	MO - Pre-Trial motions
10-21-91	MO - Day one of jury trial
10-22-91	MO - Day two of jury trial
10-23-91	MO - Day 3 of jury trial
10-24-91	MO - Day 4 of jury trial
10-25-91	MO - Day 5 of jury trial
10-28-91	MO - Day 6 of jury trial
10-29-91	MO - Day 7 of jury trial
10-30-91	MO - Day 8 of jury trial
10-31-91	MO - Day 9 of jury trial
11-1-91	MO - Day 10 of jury trial
11-4-91	MO - Day 11 of jury trial
11-5-91	MO - Day 12 of jury trial

9-23-91 thru 11-5-91 out of date order
(Con't pg 177)

(Con't From Page 176)

11/6/91	MO - Jury Deliberation & Verdict - Motions to be heard: 12/20/91 @ 9: a.m. - Probation Report & Judgment: 1/10/92
11/6/92	MO: Probation Referral: The referred of this case to probation is vacated pending the hrg. on Motions scheduled for 12/20/91
12/16/91	Order For Jury Names & Addresses
12/18/91	Request for Extension of time in which to file Points & Authorities; Waiver of time (hrg. 12/20/91)
11/13/91	Jury List
12/20/91	MO - Hrg. Re Motions for Delay: All rulings on motions will be on 2/21/92; Probation report on 3/13/92
1/10/92	Motions for New Trial
1/15/92	Exhibit #1
1/15/92	Exhibit #2
1/15/92	Exhibit #3
1/31/92	Opposition to Motion for New Trial
2/12/92	Notice of Motions & Motion to Reduce Penalty under P.C. 190.4(e) 3/13/92 @ 9 am
2/12/92	Response to Opposition
10/23/91	Declaration in Support of Request for Subpoena
10/23/91	Declaration in Support of Request for Subpoena
10/23/91	Declaration in Support of Request for Subpoena
11/4/91	Request to Conduct film and electronic media coverage and order
2/21/92	MO - fail Management Issues
2/21/92	MO - Motion for New Trial &

	Support thereof & Opposition Thereto Hrg. 3/13/92 9:00 a.m.
3/6/92	Opposition to defendant's motion for modification of the death penalty verdict (Penal Code section 190.4)) Hrg. 3/13/92 @ 9:00 a.m.

(Con't From Page 176)

ENTRIES ALL THE SAME UP TO 3/6/92 ENTRY AND THEN CONTINUES AS FOLLOWS:

4/3/92	Letter from Court Administrator & Clerk of the Supreme Court dated 4/1/92
4/10/92	Letter to Court Admin. & Clerk of the Supreme Court dated 4/10/92
4/13/92	Request of Court Reporter's for an extension
4/30/92	Letter from Madera Superior Court dated 4/28/92 to Court Admin., CA Supreme Court

(Cont. to page 178)

(Con't From Page 177)

5/26/92	Request from Supreme Court For Court Reporter's - Grant
5/27/92	Letter to Court Admin., CA Supreme Court dated 3/27/92
5/10/93	In Bank
5/10/93	Letter from Supreme Court appointing Donald J. Howath, Esq.
6/3/93	Application for Extension of Time to Request Correction of the Record in the Trial Court
6/3/93	Supreme Court ltr granting request for extension of time
7/20/93	Letter from Donald J. Howath
7/20/93	Application for second extension of time
7/26/93	Ltr. from the Supreme Ct. granting extension of time to 9/20/93
9/20/93	Ltr. from the Supreme Ct. granting Extension of Time to 10/20/93
10/21/93	Ltr. from the Supreme Ct. granting Extension of Time to 11/19/93
11/17/93	Application for Fifth Extension of Time to Request Correction of the Record in the Trial Court
11/22/93	In Bank from Supreme Court for Extension Until 12/3/93
12/2/93	Application for sixth extension of time to request correction of record in trial court
12/7/93	Letter from Supreme Court granting extension to 12/23/93
12/20/93	Application for seventh extension of time to request correction of record in trial court

12/22/93	Letter from Supreme Court granting extension to 1/12/94
1/12/94	Application for eighth extension of time to request correction of record in trial court
1/19/94	Letter from Superior Court granting extension to 3/18/94
2/22/94	Notice of Change of address of counsel and telephone number
3/1/94	Amended notice of change of address & telephone number
3/22/94	Application for ninth extension of time to request correction of record in the trial court
3/25/94	Application of appellant is granted [?] including Maybe - 1994 for request correction of record on appeal
5/10/94	Application for 10th extension of time to request correction of record in trial court
5/11/94	Application of appellant granted to May 13 - 1994 to request recorrection of record on appeal

(Con't From Page 178)

5/13/94	Defendant's request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to examine sealed transcripts and to settle record on appeal
5/26/94	Copy of Letter from Attorney General Re: Informal Response to Appellant's request
6/7/94	Letter from Att. Donald Howath dated 5/23/94

[The above docket sheet entries are copies of handwritten entries made by different people and have been interpreted by a typist as best as she could]

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX V

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. CIV-F-92-5167-REC-P

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

DANIEL E. LUNGREN
Attorney General of the State of Califor

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
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BEST AVAILA

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison

Respondent and Appellee.

INTRODUCTION

Appellee hereby petitions for a rehearing and suggests a rehearing en banc of the Court's opinion, filed May 26, 1995, reversing the District Court's dismissal without prejudice of appellant's habeas corpus petition on grounds of abstention under comity because appellant's case was not yet final since it is still pending in the California Supreme Court. Rehearing

should be granted because (1) the Court's purported finding of "extraordinary delay" to justify permitting appellant to attack the guilt phase of his murder conviction in the federal courts on habeas corpus while his penalty appeal is pending in the state courts is not supported by the state record, is contradicted by the state record, and lacks any evidentiary support, and (2) because permitting federal review in the absence of a final judgment is contrary to the law of abstention under comity.

ARGUMENT

I.

REHEARING SHOULD BE GRANTED BECAUSE THERE IS NO EVIDENCE TO SUPPORT THE PANEL DECISION FINDING OF EXTRAORDINARY DELAY

Appellee objects to this Court's purported finding of "extraordinary delay" in this case based on the mere fact that Appellant Phillips was convicted in 1980, that the California

Supreme Court reversed the death penalty and affirmed the guilt conviction in 1985, and that Phillips was not resentenced to death until 1992 with his automatic appeal pending since 1993.

First, the question of delay was never an issue considered in the questions posed in this Court's order to show cause. Thus delay was never briefed by appellee. Delay only came up for the first time at oral argument and counsel for Appellee had not prepared to discuss the question of delay. It is patent from the *full* record that most of the delay was of Phillips' own choosing, since he was quite active in his opposition to any penalty retrial.[1/]

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1. Appellee's problem is that the way this case has developed there is no record before this Court, other than the briefing on the order to show cause which was limited to answering three questions and did not deal with the issue of delay. Presumably the record before this Court does contain the instant petition for writ of habeas corpus filed in the District Court, and whatever documentation appellant's counsel provided the Court in April 1995 regarding the Madera County Superior Court docket sheets for the murder trial and two habeas corpus petitions filed in the California Court of

Accordingly, appellee submits the following facts in regard to appellant's capital case should be considered.

Appellant was arrested for murder on March 17, 1978, and thereafter extradited to California. The Information charging capital murder was filed in Madera County Superior Court on July 16, 1979. On January 21, 1980, appellant's jury trial commenced. On February 20, 1980, appellant was sentenced to death. Appeal to the California Supreme Court is automatic under Penal Code section 1239, subdivision (b).[2/]

Appeal, Fifth District, after this Court first requested counsel for appellee to send copies of the Clerk's Transcripts for appellant's initial murder trial and his penalty retrial (which contained entries for his state habeas corpus proceedings as well) and then withdrew that request. While appellant has listed all his state habeas corpus filings in his petition filed in the District Court, the Clerk's Transcripts for his penalty retrial, which includes those habeas corpus proceedings, contains all of appellant's pleadings utilized to delay his penalty retrial. With this in mind, appellee will attempt to establish what has taken place, and when, in this case. Copies of these Clerk's Transcripts have already been prepared and are still available to this Court on request.

2. This information comes from the Clerk's Transcripts

On his automatic appeal, appellant first filed a motion for summary reversal on November 17, 1980. Appellee opposed the motion which was denied on December 24, 1980. The Appellant's Opening Brief was filed on or about January 9, 1981. The Respondent's Brief was filed on February 6, 1981. Oral argument was on October 4, 1982. On February 23, 1984, the Supreme Court requested simultaneous supplemental briefing directed to specific questions the court had, due in 30 days. Supplemental briefs were filed. On May 29, 1985, appellee filed a motion to expedite issuance of the opinion. On December 31, 1985, in *People v. Phillips*, *supra*, 41 Cal.3d 29, the California Supreme Court affirmed appellant's conviction for murder but reversed the death penalty. On January 18, 1986, appellee filed a petition for

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of appellant's first trial, from the petition filed in the District Court, and from *People* v. *Phillips*, 41 Cal.3d 29, 222 Cal.Rptr. 127, 711 P.2d 423 (1985).

rehearing, which was denied on February 20, 1986, and the remittitur issued.[3/]

On March 7, 1986, at the hearing on the remittitur, appellant waived all conflicts regarding his being represented by attorney Thomas Mills, and waived statutory time for trial. On April 10, 1987, appellant filed (1) a motion to strike the death penalty as disproportionate, (2) a motion for an in camera hearing regarding a petition for writ of habeas corpus attacking the guilt phase of appellant's prior jury trial, (3) a motion to exclude nonstatutory aggravating evidence, (4) a declaration of co-counsel seeking to (1) have the jury sequestered throughout his penalty retrial; (2) have all trial spectators security searched; (3) that all witnesses be security searched; (4) that all witnesses be excluded prior to and after their testimony; (5) for daily transcripts; (6) to exclude

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3. These facts can be found in the California Supreme Court's docket entry for *People* v. *Phillips*, Crim 21374; appellee has copies of all relevant filings.

photographs of victim Bruce Bartulis; (7) to exclude photographs of victim Ronald Rose; (8) to exclude all nondiscovered evidence; (9) to examine non-resident Bob Mayo by commission; and (10) to refrain from reading appellant's prior convictions to the jury, (5) a motion to suppress evidence of appellant's intercepted jail mail and the tape recordings of the telephone conversations between himself and Richard Graybill and between Richard Graybill and Sharon Colman, and (6) a motion to exclude certain evidence. On April 22, 1987, the trial court granted the request of appointed co-counsel John Barker to withdraw from representing appellant, and on April 23, 1987, attorney Marshall Hodgkins was appointed co-counsel to represent appellant. On July 17, 1987, the People filed points and authorities in opposition to appellant's motions (1) to suppress evidence of letters and telephone conversations; (2) to exclude evidence of the vehicle, (3) to exclude non-statutory aggravating evidence; (4) to strike the death penalty; and (5)

to exclude photographs of the victims and to prohibit witnesses from discussing the case. On December 4, 1987, the request to sequester the jury was denied. The motion to search spectators and witnesses was granted, to exclude photographs was denied, subject to reconsideration, and to exclude all non-discovered evidence was granted. The requests to examine on commission and that priors not be used was granted. The court denied any further hearing on the motion to suppress, finding the issues had already been litigated. The motions to exclude evidence of the vehicle and to strike the death penalty were continued. The motion to exclude non-statutory evidence in aggravation was denied, subject to being reconsidered if requested. On January 25, 1988, following a hearing,[4/] the trial court denied appellant's ancillary motion re habeas corpus for an in camera hearing. On April 8, 1988, appellant filed a

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4. At that hearing, appellant withdrew his motions to strike the death penalty as disproportionate and to exclude evidence of the vehicle and some photographs.

petition for writ of habeas corpus. On August 28, 1989, appellant was ordered removed from San Quentin prison to be housed in the Madera County Jail pending outcome of his penalty retrial, along with being granted a series of exceptionally special privileges while housed in the Madera County Jail.[5/] Upon request of Madera County Counsel for reconsideration of the above orders, the transportation order was revoked and the matter set for hearing. On September 21, 1989, the Madera County Counsel filed an opposition to appellant's motion for appointment of a court master. On October 13, 1989, the motion was denied. (CT 1138.) On October 13, 1989, appellant was represented by Katherine Hart, with himself as co-counsel.[6/] On October 30, 1989, the trial court's orders of October 23, 1989, granting appellant pro

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5. This was apparently based on appellant's request for extensive pro per privileges.

6. This is the first indication in the record that attorneys Mills and Hodgkins were no longer representing appellant. When they actually dropped out of the case is not specified.

per privileges, but less generous in the extra privileges granted, and ordering appellant removed from San Quentin and housed in Madera County Jail pending the outcome of the penalty trial, were filed. On November 30, 1989, appellant requested transcripts of all proceedings from the time of the filing of the complaint through sentencing be prepared for the purpose of filing a pretrial writ. On December 8, 1989, the court filed a temporary order re appellant's jail accommodations pending the petition for reconsideration.[7/] On December 22, 1989, appellant filed a declaration in support of ex parte "confidential filing." On January 4, 1990, the habeas corpus evidentiary hearing commenced. Thereafter, regarding certain motions made by appellant, the court granted the motions for a telephone, for additional reading lamps, and for a portable recording device. On January 5, 1990, the evidentiary portion

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7. Both county counsel and appellant sought reconsideration of the pro per status order dated October 23, 1989.

of the habeas corpus hearing recommenced. After argument by counsel, the matter was taken under submission. On February 14, 1990, appellant's petition for writ of habeas corpus was denied. On March 2, 1990, an amended order granting appellant extensive pro per privileges was filed. On July 18, 1990, appellant's request for copies of all documents and transcripts relevant to his pretrial petition for writ of habeas corpus was filed. On November 19, 1990, appellant challenged Judge DeGroot pursuant to Code of Civil Procedure section 170.6. On January 4, 1991, appellant's section 170.6 motion was granted; another judge would hear the case. On May 9, 1991, appellant's petition for writ of habeas corpus was denied by the Court of Appeal, Fifth Appellate District and the stay order of August 16, 1990, vacated. On August 2, 1991, appellant filed a motion under Penal Code section 1424 to recuse the entire office of the Madera County District Attorney. On August 13, 1991, the District Attorney opposed the motion to recuse his entire

office as did the Attorney General. On that same August 16, 1991, appellant filed a habeas corpus petition. Following a hearing on August 16, 1991, the trial court denied appellant's motion to recuse the Madera County District Attorney's Office. On August 29, 1991, the People filed a motion for discovery from the defense. On September 3, 1991, the order denying appellant's August 16, 1991, petition for writ of habeas corpus was filed. On September 12, 1991, appellant filed requests for a lap-top computer and for additional legal interview time, which were granted. On October 1, 1991, a stipulation further amended the order concerning his pro per privileges. On September 23, 1991, appellant's jury trial commenced. On November 6, 1991, the jury verdict was death. On January 10, 1992, appellant filed a motion for a new trial, which the People opposed on January 31, 1992. On February 12, 1992, appellant filed a response to that opposition. The motion for a new trial was heard on February 21, 1992, and denied. On February 12, 1992, appellant filed

a motion to reduce penalty under Penal Code section 190.4, subdivision (e). On March 6, 1992, the People filed an opposition to appellant's motion to modify the death penalty verdict. The matter was heard on March 13, 1992, and denied. On that same March 13, 1992, appellant was sentenced to death.[8/]

According to appellant's habeas corpus petition filed in the District Court, on April 8, 1988, appellant filed a habeas corpus petition in the Madera County Superior Court. In November 1988 there was an evidentiary hearing. On January 14, 1989, the petition was denied. Petition p. 2. On November 18, 1988, appellant filed a second habeas corpus petition in the Madera County Superior Court. On January 6, 1988, the court issued an order to show cause. On January 4-5, 1990, there was an evidentiary hearing. On February 14, 1990, the petition was denied. Petition pp. 2-3. On August

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8. This all comes from the Clerk's Transcript of appellant's penalty trial.

10, 1990, appellant filed a third habeas corpus petition with the California Court of Appeal, Fifth Appellate District. On August 16, 1990, that court stayed the penalty retrial. The California Attorney General filed a response brief, and Phillips filed a traverse. On May 9, 1991, the petition was denied and the stay order vacated. Petition pp. 7-9. On May 20, 1991, appellant filed a petition for review of the Fifth District Appellate Court's denial of his petition with the California Supreme Court. On July 17, 1991, the petition was denied. Petition p. 9. On August 16, 1991, appellant filed a fourth habeas corpus petition in the Madera County Superior Court. On August 30, 1991, the petition was denied. Petition pp. 9-11. On September 13, 1991, appellant filed a habeas corpus petition in the Fifth District Court of Appeal. On September 18, 1991, the petition was denied. Petition p. 12. On September 18, 1991, appellant filed a habeas corpus petition in the California Supreme Court. On September 23, 1991, the petition was denied. Petition pp. 12-13.

Appellant filed the instant petition for writ of habeas corpus in the Federal District Court for the Eastern District.[9/] On March 12, 1992, the petition was denied without prejudice because of appellant's pending capital appeal on the same case in the California Supreme Court. On May 14, 1992, the District Court denied appellant's request for a certificate of probable cause to appeal. On June 18, 1992, this Court granted appellant's request for a certificate of probable cause. On August 26, 1992, this Court set a briefing schedule: appellant's opening brief due October 13, 1992, appellee's brief due November 30, 1992, and appellant's reply brief due December 21, 1992. On October 1, 1992, counsel was appointed to represent appellant and ordered to file a brief within 60 days on the question of whether the appeal should be dismissed for lack of exhaustion. Appellee was given the

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9. The petition is dated February 28, 1992; the proof of service is dated March 3, 1992. The Attorney General's copy was received on March 9, 1992.

option of responding within 21 days of receipt of that brief. On October 16, 1992, this Court cancelled the briefing schedule of August 26, 1992, and deferred to the briefing schedule set on October 1, 1992. On December 2, 1993 -- no brief by appellant's counsel having been filed as ordered on October 1, 1992 -- this Court issued an order to show cause, asking that three questions be answered within 30 days of receipt of the order. On December 27, 1993, appellee filed its return with this Court. On October 11, 1994, this Court heard oral argument on the order to show cause. On May 26, 1995, this Court issued the instant opinion in this case.

The time between appellant's arrest in March 1978 and conviction and sentence in February 1980 cannot be characterized as an unjustified delay since it involved extradition in a capital case. Likewise, it would be a mischaracterization to call the time between the filing of the appellate briefs in January and February 1981, and the decision on December 31, 1985, as an unjustified delay since

the California Supreme Court took extra pains with this case, requesting supplemental briefing in areas of concern before reversing the penalty, all to appellant's benefit. It is clear that the delay between the 1985 reversal of the penalty and the penalty retrial in late 1991 was intentionally caused by appellant. The delay following the District Court's denial of appellant's habeas corpus petition in March 1992 and this Court's reversal of that ruling on May 26, 1995, is attributable to appellant and this Court. There just was no "extraordinary delay" calling for the ruling this Court has made.

In regard to any delay in the correction of the trial transcripts, respondent submits the bulk of the delay was caused by appellant. He did something unique at his penalty retrial; he tape recorded it. As noted at oral argument his proposed correction to the record is based on listening to the trial tapes and comparing them with the trial transcript. This is a laborious time consuming process. Counsel for appellant received at least 10 extensions of time to make corrections to

the record. The paralegal doing this for appellee (after first having to obtain a set of tapes and Phillips' tape recorder) is on tape 22A, only tapes 22B and 23 remain. Thus, the marathon record correction procedure is nearing an end. If appellant had not utilized these tapes this could have concluded within weeks of appellant's proposed corrections.[10/]

Thus, there just is no evidence to support this Court's finding of "extraordinary delay." Any delay in the state courts was either legitimate and to appellant's benefit, or was the direct result of appellant's delaying tactics.

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10. In this regard, appellee would note that the normal practice of capital defendants is to use the record correction process as a *delay* tactic. The corrections are petty and rarely substantive. Appellee has not sat doing nothing during this delay. The Statement of the Case and the Statement of Facts have already been written, and counsel for appellee merely awaits the Appellant's Opening Brief.

II.

REHEARING SHOULD BE GRANTED BECAUSE WITHOUT EXTRAORDINARY DELAY THIS IS NO LONGER THE RARE CASE WHERE EXCEPTIONAL CIRCUMSTANCES OF PECULIAR URGENCY ARE SHOWN TO EXIST TO AVOID ABSTENTION UNDER COMITY

"[C]omity was the basis of the exhaustion doctrine: 'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist."'" *Rose v. Lundy*, 455 U.S. 509, 515-516; 71 L.Ed 2d 379, 102 S.Ct. 1198 (1982).

Appellee has already established in Argument I, *supra*, that there is no factual basis to support a finding of extraordinary delay.

Appellee also takes exception to this Court's finding that "No further review of the guilt phase in the state court is available." In his Response to Order to Show Cause filed with

this Court, appellant's counsel has specifically stated at page 2 that in regard to his additional appointment to represent appellant in his pending capital appeal, "My appointment includes guilt habeas corpus petitions" that had not been raised earlier in the California Supreme Court. "I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." It is thus patent that appellant still believes he has available to him collateral review of the guilt phase in the state courts.[11/] The guilt phase is thus *not* final.

In addition, appellee challenges the point that "during so long a delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable. In short, the opportunity for a fair trial

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11. Appellee of course reserves the right to procedurally challenge any guilt phase issues that might be raised on state habeas corpus, if such objection is available. *Russell v. Rolff*, 893 F.2d 1033 (9th Cir. 1990).

diminishes as each day passes." Not so in this case. At the 1991 penalty retrial there was no problem with witnesses. The death of Richard Graybill was used by appellant to his advantage by presenting evidence through new witnesses that Graybill could not rebut.[12/]

Not being a rare case and state action not being final, the District Court's abstention under comity was proper.

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12. In regard to footnote 4, there is an error. This Court assumes that appellee was not properly served the petition "potentially depriving it of an opportunity to contest whether he fully exhausted state remedies for the claims within the petition." This is incorrect. The state was served. The petition is dated 28 February 1991 (Petition p. 33), but the proof of service is dated March 3, 1992. Appellee received the petition on March 9, 1992. It was the quick action by the District Court dismissing the petition without prejudice on March 12, 1992, before appellee had any idea what action to take in regard to the petition, not lack of service, that left appellee no opportunity to claim failure to exhaust, if such remedy is available. In this regard, since this is only a guilt phase challenge it should not be considered a capital case for habeas corpus purposes. Thus, *Rose v. Lundy*, *supra*, 455 U.S. 509, 521-522 controls; Local rule of the Eastern District, Rule 191(h)(5) is inapplicable.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that rehearing/rehearing en banc should be granted.

Dated: October 3, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

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Deputy Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Richard Louis Arnold Phillips **No. 92-15828**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

PETITION FOR RHEARING AND SUGGESTION FOR REHEARING EN BANC

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, CA 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, Ca 94964

Each said envelope was then, on June 7, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 1995, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX W

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, Warden, San Quentin State Prison Respondent and Appellee.	Case No. 92-15828

On Appeal from the
United States District Court
for the Eastern District
of California
No. CV-F-92-5167-REC-P

RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

RICHARD L.A. PHILLIPS
Proceeding *pro se*
C-13707 3-E-111
San Quentin, Ca 94964

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DEATH PENALTY CASE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	
vs.	)	RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
A. CALDERON, Warden, San Quentin State Prison,	)	
Respondent.	)	

To: THE HONORABLE JUSTICIES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant RICHARD LOUIS ARNOLD PHILLIPS respectfully submits the following **RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**, per order of the panel of

fletcher, Reinhardt and Kleinfeld, filed 30 June 1995.

I.

STATEMENT OF THE CASE

Certificate of Probable Cause (CPC) issued by this Court to address:

> Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of penalty phase issues arising from a partial retrial?

In PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE (Appellant's Opening Brief) filed 4 January 1994, Appellant argued: "...the real question that must be answered is: From where do the alleged set of operative facts stem? (¶) Petitioner contends a bifurcated death penalty case must be considered ripe for federal review, cause-by-cause, NOT as a single issue." (Appellant's Opening Brief at pg. 7)

The entire panel, correctly, accepted this "bifurcated"argument. (The Opinion, pg

5803-4 rationale expanded upon in fn. 1)

Appellant defers all further legal arguments to advisory counsel. Appellant outlines the above only to offer comment on the issue of comity.

Do not be distracted by the smoke-and-mirrors of Appellee's motion for rehearing (MR). Who/what caused any past delay is not the issue. The only relevant question is how long will appellant be required to wait in the future for federal review of the constitutional validity of his conviction?

NO ONE, not this court, not the state of California, and not Appellant, can properly answer several critical questions. How long will the California Supreme Court take to review the second automatic appeal? Will there be a state habeas corpus evidentiary hearing ordered? If errors presented in either the second automatic appeal or state habeas are found to be prejudicial, how long will it take to conduct a third penalty

retrial? If again sentenced to death, how long would it take to exhaust state review of a third, unwaivable, automatic appeal as to penalty?

The entire panel acknowledged that the Seventh Circuit Court of Appeals properly addressed these exact bifurcated circumstances by granting *Burris* review. (the Opinion, pg. 5813-14) To rule otherwise is to tell your brethren in the Seventh Circuit they were wrong; and the United States Supreme Court that they were incorrect in their writing of *Brady v. Maryland*, 373 U.S. 83 (1963).

In sum, state review as to guilt is exhausted. The guilt half of this bifurcated case is final as to California law. Statutorily, the guilt issues are ripe for federal review. There is "no end in sight" as to the second prong of this bifurcated case.

II.

RESPONSE

1. THE STATE TRIAL COURT EXPRESSLY FOUND THAT APPELLANT WAS NOW ACTING FOR PURPOSES OF DELAY.

Appellee has not shown there was ever a statement from the trial court that appellant was acting for purpose of delay.

After spending pages 3 through 11 of the Motion for Rehearing (MR) to present finite detail of dates in pretrial motions and related proceedings, Appellee alleges that any time between 1985 to present spent on proper pre-trial preparation of this case was for purpose of delay; and is the fault of Appellant, and this Court. (MR at pg. 11-12)

To properly respond, background is required. (At this point I respectfully request this Court take notice of my SUPPLEMENTAL BRIEFING TO ORAL ARGUMENTS OF 11 OCTOBER 1994, accepted and filed 27 February 1995.) (27 Feb. 95 supp. br.)

The case originated in Madera County,

California. The city of Madera is the county seat, and the largest city in the county. At the date of original trial the population of Madera was approximately 20,000. There were two (2) superior court judges for the entire county.

Jury screening and selection lasted less than a day. Penalty and guilt trials lasted a bit more than a week. For all pre-trail motions, pre-trial preparation, conducting a trial as to guilt, another as to penalty, motion for new trial, and sentencing, attorney Paul Martin was paid $5,000.00 He gave $2,500.00 to his investigator.

Appeal of the finding of guilt and sentencing of death was taken to the California Supreme Court. There was no state habeas filed to accompany this appeal.

In the California Supreme Court's decision, at least three (3) times the Court stated that the issue(s) presented should be raised in writ of habeas corpus. *People v.*

Phillips, 41 Cal.3rd 29 (1985).

During preparation for penalty retrial, additional issues were discovered which were properly addressed in writ of habeas. As agreed upon within the defense team, Appellant was responsible for research and writing of all writs and appeals.

The trial court expressly found that no writ was for purpose of delay. On 8 April 1988 Appellant filed a writ of habeas corpus, (hereafter referred to as the "evidence writ.") The delay between filing the first writ on 8 April 1988 (MR pg. 6) and evidentiary hearing on 4 January 1990 was due in large part to Judge Bert Baily committing suicide, and several judges disqualifying themselves. (See 27 Feb. 95 supp. br.)

On 17 July 1989 the Honorable W.J. Harpham, presiding by appointment of the Chairperson, California Judicial Counsel, heard Appellant's petition to proceed *pro per*, co-counsel. The petition was granted

with the court stating:

> "The Court would further find as a result of this hearing, after having read the cited references, this is NOT a request in order to attempt to delay or prevent the orderly processes of the Court and in view of the comments, the Court does find also, I really believe the **defendant has been acting as co-counsel for some years...**" (RT 17 July 1989 Madera County Superior Court, Case No. 4852) (Emphasis added) (See also, Appellant's declaration in support of petition to proceed *pro se* with advisory counsel before this Court, filed 1 June 1992)

Appellee also blames Appellant's request for "a series of exceptionally special privileges" (MR at pg. 6) for delays. The provisions were in fact based on exhibits of orders for California capital defendants from other trial courts, and set no new precedent. The only possible delay here was from 28 August 1989 through 23 October 1989, while Madera County jail officials and Appellant reached an argument on details of the provisions order. (All provisions were at no expense to the court or county.)

On 18 July 1990, Appellant filed a

motion for discovery, as noted in MR pg. 7 Trial court record reflects that the court was clearly aware this was for the purpose of filing an additional writ of habeas corpus. The trial court had been apprised of this in July 1989. (This writ referred to hereafter as the "vehicle writ.") Again, the trial court expressly found this was not for purpose of delay.

Appellee then turn his complaining towards this Court. I am simply speechless on how to respond to allegations this Court caused delay!

Appellant had secured a CPC from this Court within six (6) months of the erroneous denial of review by the district court. Appellant filed several motions, including one to proceed *pro se* with Donald J. Horvath as advisory counsel. On 1 October 1992 the Court issued an order covering several points. After consultation with Appellant, Mr. Horvath wrote a letter to the Court,

seeking clarification. (Letter dated 16 October 1992.)

This Court took a bit more than a year to respond. Appellant does not feel it is his position to say what held up input on the issue(s) raised, but would say the next to the last paragraph of the concurring opinion (The Opinion, pg. 1518) is instructive as to the dilemma facing the Court. This circumstance has apparently never been before the Ninth Circuit.

In addition, Appellant submitted a petition for *pro se* provisions the Court chose not to address. This apparently had never been before the Ninth Circuit.

Neither of the above justify Appellant's aspersions upon the panel.

2. THE APPELLEE, IN HIS FACTUAL ALLEGATIONS, INTENTIONALLY ATTEMPTS TO PAINT A FALSE PICTURE OF STATE PROCEEDINGS.

It is Appellant's position that Appellee does not have a right to any information regarding attorney-client communications or

interactions unless disclosed by the bearer of that right.

Appellant presents limited disclosure only for the purpose of illustration. Noted in MR pg. 4-5, on 10 April 1987 counsel for Appellant filed several pre-trial motions, inclusive of a Motion to Strike the Death Penalty as Disproportionate. It was Appellant's opinion that there was no chance of prevailing in such a motion; and that such motions discredited Appellant's integrity before the Court, and would cause unnecessary delay and drain of resources of the defense. Further, since it was after all my life on the line, I had the final say-so on what was filed. Twelve (12) days later the Court had granted attorney John Barkeer's motion to withdraw, which was submitted at the insistence of Appellant.

Appellant is willing to submit *ex-parte* to this Court, a copy of the letters between attorney Barker and Appellant, which affirm

Appellant's position that no frivolous or delaying petitions would be allowed by Appellant.

Appellee attempts to characterize Appellant's exercise of his rights under California Code of Civil Procedures section 170.6 as delay. (MR at pg. 7-8) This is false and misleading. Judge DeGroot was never assigned Appellant's case. While a municipal court judge, DeGroot made several disparaging remarks about Appellant assisting another inmate with his legal work. The day after DeGroot was elected to sit on the Madera County superior court bench, Appellant filed paperwork to disqualify DeGroot. This motion was granted without response brief or hearing, via the mail, in less than one week.

Appellee states, falsely, that Appellant in fact benefited from the death of witness Richard Graybill by having another witness testify to matters Mr. Graybill could not be cross-examined about. (MR at pg. 14) A

review of the trial record reflects that the court refused to allow Tamara Nickols, the girlfriend Mr. Graybill lived with, to testify as to Mr. Graybill's statements to her immediately after the shootout.

TRIAL TRANSCRIPTS: Appellant takes exception to Appellee's fn. 10 Appellant has a constitutional right to a factual record. This Court in fact uses what Appellee calls a "unique" tactic (tape recording proceedings). Appellant didn't make the approximately 200 pages of errors in the transcripts. Therefore, Appellant didn't create the "delay"

CURRENT STATE PROCEEDINGS: On 12 January 1993 Appellant filed to have Mr. Horvath appointed by the California Supreme Court to represent Appellant on second automatic appeal. Mr. Horvath was appointed in May 1993.

For sake of discussion, Appellant assumes correction of the record will be

completed this year. This will mean the record was corrected in less than three (3) years., There are currently cases before the California Supreme Court where correction of the record has lasted in excess of seven (7) years and are still not complete. (Source: California Appellate Project.) There are currently in excess of 160 inmates under sentence of death in California, who at this time have not been appointed counsel. The average time for appointment of appellate counsel is in excess of four (4) years.

Appellant was sentenced to death 13 March 1992. Had he desired delay, why would he have affirmatively sought counsel?

This brings the discussion full circle: How long will the California Supreme Court take to review the second automatic appeal; will there be a state habeas evidentiary hearing ordered; if errors presented in either the appeal or state habeas are found to be prejudicial, how long will it take to

conduct a third penalty retrial; and if again sentenced to death, how long would it take to exhaust state review of a third, unwaivable, automatic appeal as to penalty?

One can only look to the track record of the California Supreme Court for answers. To follow the logic of Appellee's position is to say Appellant must wait until pat the year 2000 to seek federal review.

CONCLUSION

Appellee can attack the messenger all he likes, but it still comes down to the irrefutable fact: This remains the second oldest case from date of offense on California's death row - and there is still "no end in sight" as to final resolution of the second prong of this bifurcated case.

Comity will in fact be PROMOTED by allowing Appellant to go forward insofar as if Appellant prevails because it will obviate further state review as to penalty.

The state can only delay so long.

Sooner or later they are going to have to face the music - Appellant caught Madera County officials with their hand dirty. (See writ before district court.)

The motion for rehearing should be dismissed.

DATED: 14 July 1995

/s/
RICHARD L.A. PHILLIPS
Proceeding *pro se*
with advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS, Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 92-15828

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, Ca 94964

I served a copy of the attached

RESPONSE TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate delivery to correctional authorities of

outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 14th day of July, 1995 in San Quentin, California.

/s/
RICHARD L.A. PHILLIPS
pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX X

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
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Supervising Deputy Attorney General
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Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant.

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison.

Respondent and Appellee.

_____/

On Appeal From The
United States District Court
For The Eastern District of California
No. CIV-F-92-5167-RFC-P

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Donald J. Horvath #53777
43033 Glacier Lane
Coarsegold, California
93614

Phone: (209) 658-7048

Advisory Counsel for
Appellant Richard Phillips

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ. Warden, San Quentin State Prison,

Respondent and Appellee.

/

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

ARGUMENT

1. APPELLEE HAS FAILED TO ADDRESS THE ANALYSIS OF THE MAJORITY OPINION IN THIS CASE.

A majority of this court correctly held that the abstention doctrine of *Younger v. Harris* 401 U.S. 37 (1971) does not preclude the instant habeas corpus petition because (1) appellant does not seek to enjoin an ongoing state proceeding and (2) "[t]he rule against staying a proceeding does not prevent us from deciding a related issue, even if that decision ultimately renders the state

proceeding moot." (Opinion, p. 5805.) The majority opinion's analysis of this issue does not rest upon a consideration of the delay--extraordinary or otherwise--in the state court proceedings.

A majority of this court correctly held that *Rose v. Lundy* 455 U.S. 509 (1982) does not preclude the instant habeas corpus petition because that case expressly states that a state prisoner is entitled to proceed in federal court with habeas corpus claims which have been exhausted in state court and appellant has raised only exhausted claims in the instant habeas corpus petition. (Opinion, pp. 5806-5807.) The majority opinion's analysis of this issue does not rest upon a consideration of the delay--extraordinary or otherwise--in the state court proceedings.

Thus, the majority opinion correctly concluded that the lower court erred upon both grounds asserted in support of its decision to

dismiss the instant petition upon analysis which does not rest upon the past delay in state court proceedings. In its petition for rehearing, appellee does not attack the majority's analysis or conclusion, based upon considerations other than past delay in state proceedings, that the trial court erred in dismissing this habeas corpus petition.

Therefore, appellee has failed to show--or even attempt to show--that the majority opinion is wrong.

The majority opinion goes on to balance several jurisprudential concerns against appellant's right to a speedy determination of his federal attack upon the constitutional validity of his conviction of murder with special circumstances. The majority correctly concludes that this balance should be struck in appellant's favor. (Opinion, pp. 5808-5814.) The perceived "extraordinary delay" in state court proceedings is relevant only to this portion of the majority opinion.

2. ASIDE FROM ITS FAILURE TO ADDRESS THE LEGAL ANALYSIS OF THE MAJORITY OPINION, THE PETITION FOR REHEARING LACKS MERIT.

A. The Major Premise of The Petition For Rehearing Is False.

The main thrust of the petition for rehearing is that appellant is responsible for the past delays in the state courts. Appellee states. DIt is patent from the fun record that most of the delay was of PhillipsS own choosing. since he was quite active in his opposition to any penalty retrial." (Petition for Rehearing, p. 2.) Appellee states, "It is clear that the delay between the 1985 reversal of the penalty and the penalty retrial in late 1991 was intentionally caused by appellant." (Petition for Rehearing, p. 11.)

Appellee has failed to prove the major premise upon which the petition for rehearing rests--an assertion that appellant intentionally caused the past delays in state court proceedings. The alleged facts relied upon by appellee to support this assertion show only

that appellant vigorously litigated (1) his penalty retrial, (2) his pending appeal from the second death sentence, (3) his rights as a criminal defendant representing himself, and (4) collateral attacks upon his conviction by means of several state habeas corpus petitions.

Whether appellee likes it or not, appellant has a right to litigate these matters. Litigation takes time. Therefore, the fact that appellant has exercised his right to litigate important issues does not establish that he intentionally delayed the state court proceedings.[1]

Appellee relies upon the alleged fact that appellant filed motions in the state

[1] Since I believe the petition for rehearing is insufficient on the face of the argument advanced by apsellee, I will not address in detail the various penalty trial pleadings which apDellee asserts were filed for purposes of delay. Appellant will address some of appellee's more egregious false assertions regarding such matters in his reply.

penalty retrial proceedings. However, there is no showing that these motions were frivolous or filed for purposes of delay. Absent such a showing, the fact that motions were filed proves nothing. The alleged fact that some motions were denied does not establish that they should not have been filed; some of the motions were granted.

Appellee relies upon the fact that appellant litigated several habeas corpus petitions attacking his conviction in state courts. However, appellant was required to exhaust his state remedies upon such issues before filing a petition in federal court. The fact that appellant did what the law required of him proves nothing.[2]

---

[2] Upon one state habeas corpus petition, the Fifth District Court of Appeal stayed the penalty retrial for almost 10 months--from 16 August 1990 to 9 May 1991. (Petition for Rehearing, p. 8.) The Fifth District obviously did not consider this petition to be frivolous, appellant is not responsible for this delay unless he somehow is precluded from filing viable habeas petitions.

Appellee urges that appellant is responsible for the delay in certifying the record on appeal from the penalty retrial because he had the audacity to tape record the testimony and the tape recordings show transcription errors. (Petition for Rehearing, p. 12.) However, appellant is entitled to an accurate record on appeal, and it is not his fault that the court reporters cannot do their job.[3]

---

[3] 3. At footnote 10 of the petition for rehearing, appellee says "the normal practice of capital defendants is to use the record correction process as a *delay* tactic. The corrections are petty and rarely substantive." Since the record on this appeal does not support such an assertion, one can only presume this is a request for judicial notice of such normal practice. Footnote 10 is an Outrageous attempt to prejudice appellant. It should be ignored by this court. The issue raised by appellee is what appellant has done--not what other or nnormal" capital defendants may have done. "Normal" capital defendants probably do not push their cases to an early judgment as appellant is trying to accomplish on this very appeal. Therefore, it appears that appellant is not a "normal" capital defendant. In any event, judicial notice of the alleged normal practice of capital defendants clearly is improper.

Appellee implies that attorney Horvath, appellant's counsel on his direct penalty appeal, took unreasonable time to correct the record on appeal because Horvath obtained 10 extensions of time to file a motion to correct the record. (Petition for Rehearing, p. 12.) However, the extensions obtained by Horvath were required by the state of the record and did not unreasonably delay the direct appeal.

Horvath, who did not represent appellant at his second penalty trial, received the record on appeal on 11 May 1993--1,414 pages of clerk's transcript and 5,690 pages of reporter's transcript. Horvath filed an extensive (144 pages) motion to correct and augment the record one year later on 13 May 1994--aside from numerous reporter's transcript errors, many documents had been omitted from the clerk's transcript.

Appellee filed its final informal response to this motion on 28 June 1995--over a year after appellant's motion was filed.

Appellee did not contest appellant's request to augment the record on appeal to include numerous documents. Appellee did not contest a vast majority of appellant's requests to correct the reporter's transcripts.

Appellee implies that attorney Horvath improperly failed to file a pleading as ordered by this court on 1 October 1992. (Petition for Rehearing, pp. 10-11.) This also is not true. By letter to this court of 16 October 1992, Horvath properly expressed his concern regarding the ethical propriety of filing a pleading against the interests of appellant, who is his client.

Appellee states, "It is thus patent that appellant still believes he has available to him collateral review of the guilt chase in the state courts. (Petition for Rehearing, pp. 13-14.) This amazing conclusion is grounded upon statements of attorney Horvath. (Petition for Rehearing, p. 13.)

Again, appellee is wrong. Since Horvath was appointed by the California Supreme Court to represent appellant upon his appeal from the second penalty trial. Horvath inquired of the Supreme Court (1) whether his appointment included the duty to investigate guilt habeas corpus issues, and (2) whether he would be paid for work on habeas corpus petitions attacking the guilt adjudication. Horvath's attempt to ascertain the scope of his duties and the work for which he would be paid was proper and reasonable. Horvath made similar inquiry of this court.

However, an inquiry by Horvath regarding the scope of his duties proves only that Horvath was concerned about the scope of his duties. Such an inquiry certainly does not prove that either Horvath or appellant believes that collateral review of guilt issues is still available in state court as asserted by appellee!

In his declaration dated 26 February

1992 (Exhibit 3 to the habeas corpus petition) Horvath stated under oath:

"6. In my, oDinion, the adjudication the (sic. "that) Phillips is aullty of murder with special circumstances is final in California courts upon all issues raised in his federal habeas Corpus petition, Phillips cannot obtain further review of the guilt adjudication in California courts by direct appeal or writ petition upon the issues raised in his federal petition. I believe additional California habeas corpus petitions upon these grounds would be denied as repetitive of prior petitions which were denied."

This quotation is the only relevant portion of the record on appeal; nothing in the record rebuts Horvath's opinion. Appellee's unreasonable inference from Horvath's attempt to ascertain the scope of his duties clearly does not contradict or in any way rebut the above quotation.

Nothing has occurred since 26 February 1992 to change Horvath's sworn opinion. In fact, subsequent events indicate that Horvath's 1992 opinion is correct--the very events relied upon and distorted by appellee so indicate.

Horvath stated in response to this court's order to show cause:

"On 18 May 1993, Mr. Reichman called me on the telephone and stated the following: My appointment includes guilt habeas corpus pets to ons. However. Petitioner's two Previous habeas corpus pleadings filed in the California Supreme Court had been denied on the merits. Therefore, I would not be paid for doinrany habeas corpus issues attacking the guilt adjudication which had been raised in the prior pleadings; I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions." (Emphasis added.)

Appellee conveniently omitted the most important fact from Horvath's statement--the fact that the California Supreme Court indicated that appellant's prior pleadings attacking his guilt adjudication had been denied on the merits. The Supreme Court was not interested in seeing previously raised guilt issues again (which is why they would not pay Horvath to do the work). It is these very issues which are raised in the instant federal petition.

Finally, my experience with appellant

indicates that he is not trying to delay adjudication of his penalty appeal. If appellant was interested in delay, he simply could have waited several years for counsel on direct appeal to be appointed for him. Instead, appellant affirmatively asked me to represent him on appeal and thereby advanced his case by several years.

B. The Balance Between Jurisprudsential Concerns And Appellant's Right To A Speedy Determination of His Federal Attack Upon The Constitutional Validity of His Conviction Struck BY This Court Remains The Same Regardless of Who Caused The Past Delays In State Court Proceedings.

The 15 years of past delay does not disappear upon a conclusion that appellant caused some or most of such delay[4] this appeal remains the same--whether petitioner

---

[4] A conclusion that appellant caused much of the past delay would be relevant to the concurring opinion of Justice Kleinfeld since he grounds his opinion upon an equitable exception to the *Younger* doctrine. However, appellee has failed to show that appellant is responsible for the past delay. (Point 2-A above.)

must wait undetermined amount of additional time in the future before he is allowed to litigate his federal attack upon the consitutional validity of his state conviction. The answer remains "no" because the prejudice to appellant from future delay still outweighs relevant jurisprudential concerns for the reasons stated by the majority.

C. 28 U.S.C. Section 2254 Grants Appellant A Statutory Right To Proceed Upon His Federal Habeas Corpus Petition.

Section 2254 subdivision (a) provides in relevant part that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States." (Emphasis added.) Appellant has filed such a petition.

Section 2254 subdivision (b) states an exception to the general rule--federal habeas

corpus relief cannot be granted unless the petitioner has exhausted his state remedies upon the federal claims asserted. Appellant's habeas corpus petition pleads exhaustion of his state remedies upon all federal claims asserted. (Habeas Corpus Petition. p. 15, ¶ 11.) Therefore, the exception does not apply and appellant has a statutory right to proceed upon his federal petition.

Appellee may, of course, take issue with this factual allegation and all other factual allegations made in appellant's habeas corpus petition in the district court. However, appellant's habeas corpus petition properly pleads a federal action authorized by statute; therefore, the district court erred in dismissing the petition.

By enacting section 2254 and thereby granting appellant a right to proceed upon his federal petition, Congress has resolved all relevant jurisprudential concerns in appellant's favor. Unless the statute is held

to be unconstitutional, federal courts are not free to disregard this statute by denying appellant his statutory right to proceed upon the instant habeas corpus petition.

D. The Petition For Rehearing Is Grounded Upon Alleged Facts Which Are Outside of The Record Dn Appeal.

The record upon this appeal consists of the habeas corpus petition filed in the district court and several state court dockets supplied by appellant upon request of this court. The petition for rehearing improperly and extensively relies upon facts allegedly shown by the full record of state court proceedings upon the penalty retrial which is not a part of the record on appeal. (See, Petition for Rehearing, fn. 1.)

CONCLUSION

The petition for rehearing lacks merit. Therefore, it should be denied.

Appellant Richard Phillips respectfully so prays.

DATED: 11 July 1995

Respectfully submitted,

/s/

Donald J. Horvath

Advisory Counsel For
Appellant Phillips

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No 92- 15828

I, Donald Horvath. declare that I am over 18 years of age and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

REPLY TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 18 July 1995. sealed and deposited in the United States mail at Coarsegold, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 18 July 1995 at Coarsegold, California.

Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-1

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-152

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

NOTICE OF LODGING

Respondent offers the following documents to be lodged with this Court under separate cover.

ITEM 1 -- Clerk's Transcipt, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. I.

ITEM 2 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. II.

BEST AVAILABLE COPY

ITEM 3 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. III.

ITEM 4 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. IV.

ITEM 5 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. V.

ITEM 6 -- Clerk's Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Vol. VI.

ITEM 7 -- Clerk' Transcript, *People v. Phillips*, Madera County Superior Court No. 4852, Reconstructed Clerk's "C" file.

ITEM 8 -- Docket sheet, California Supreme Court, *People v. Phillips*, No. S004320 (first appeal).

ITEM 9 -- Docket sheet, California Supreme Court, *People v. Phillips*, No. S025880 (second appeal).

ITEM 10 -- Request from California Supreme Court for supplemental briefing on 8 questions in *People v. Phillips*, No. S004320/Crim 21374.

ITEM 11 -- Draft of respondent's Statement of the Case in *People v. Phillips*, No. S025880.

ITEM 12 -- Appellant's Defendant's Request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to Examine Sealed Transcripts and to Settle Record on Appeal, containing respondent's responses thereto, in *People v. Phillips*, No. S025880.

ITEM 13 -- Respondent's Informal Response to Appellant's Request for Sequential Designation of the Record, Correction of Transcripts, Additional Record on Appeal, to Examine Sealed Transcripts and to Settle the Record on Appeal in *People v. Phillips*, No. S025880.

ITEM 14 -- Letter to trial court that respondent has completed the review of appellant's request for corrections to the transcript (the responses are set forth in Item 12) in *People v. Phillips*, No. S025880.

ITEM 15 -- Appellant's counsel's letter to trial court re response to respondent's disagreements with appellant's request for transcript corrections in *People v. Phillips*, No. S025880.

CONCLUSION

Accordingly, respondent respectfully asks that the attached materials be lodged with this Court and included in the record before this Court.

Dated: July 19, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General
State Bar No. 42985

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Phillips v. Vasquez **No. 92-15828**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

NOTICE OF LODGING

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, CA 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, CA 94964

Each said envelope was then, on July 19, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 1995, at Sacramento, California.

_____

DECLARANT

Stamped:

"RECEIVED
Cathy Catterson, Clerk
U.S. Court of Appeals
Jul 21, 1995
Filed _____
Docketed 7/24/95 ew

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
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(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-2

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
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WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
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1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

DANIEL LUNGREN LETTERHEAD

July 18, 1995

United States Court of Appeal
for the Ninth Circuit
Cathy Catterson, Clerk
121 Spear Street, P.O. Box 193939
San Francisco, CA 94119-3939

RE: Phillips v. Vasquez
No. 92-15828

Dear Ms. Catterson:

As indicated in Footnote 1 to respondent's petition for rehearing in the above-entitled matter, the record presently before this Court does not contain an accurate account of what went on in the state court proceedings. I understand that the Court does have the Madera County Superior Court docket sheets, which were provided by appellant's counsel after oral argument. I have obtained copies of the docket sheets which the Madera County Clerk's Office provided to appellant's counsel. After reviewing these docket sheets I feel those abbreviated entries fail to adequately explain what took place in the Madera County Superior Court following the penalty reversal by California Supreme Court. I feel the Clerk's Transcripts of those proceedings, which this Court had initially requested from respondent, are more complete and more informative. Accordingly, pursuant to the attached Notice of Lodging, respondent wishes to lodge those transcripts (consisting of 7 volumes) with the Court, along with the docket sheets from the California Supreme Court on both the appeals and the request for supplemental briefing 8 questions by that Court on the first appeal.

As further noted in the petition for rehearing, our office has already completed the Statement of the Case and the Statement of Facts for use in appellant's pending automatic appeal of his penalty retrial before the California Supreme Court and just await the filing of Appellant's Opening Brief. Accordingly, respondent is also lodging the already completed Statement of the Case to assist this Court in reviewing the Clerk's Transcripts.

Lastly, in order to aid this Court in its understanding of the developments in appellant's pending state appeal, respondent is lodging the relevant documents that have been filed in that case regarding correction and expansion of the appellate record.

If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

DANIEL E. LUNGREN
Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General

EDM:msd
Enclosures

DECLARATION OF SERVICE BY MAIL

Re: People v. Louis Arnold Phillips
No. S025880

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

LETTER TO UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, Ca 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, Ca 94964

Each said envelope was then, on July 19, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 1995, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Y-3

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,,

Respondent and Appellee.

MOTION TO LODGE DOCUMENTS

Pursuant to FRAP Rule 27 and 9th Circuit Rule 27-1, respondent moves to lodge the documents listed in the attached Notice of Lodging[1/] with this Court so they may be judicially noticed under Federal Rules of Evidence, Rule 201(b), 28 U.S.C.A.

1. The Notice of Lodging, and the documents listed therein, have already been received at the Ninth Circuit Clerk's Office.

As indicated in Footnote 1 to the respondent's petition for rehearing in the instant case, because of the unique way this case proceeded in the federal courts, the record presently before this Court is practically nonexistent. It does not contain an accurate account of what went on in the state court proceedings of appellant's initial state capital appeal and his retrial of the penalty phase following reversal by the California Supreme Court.

While the Court may have the docket sheets from the Madera County Superior Court, as provided by appellant's counsel following oral argument, they are not as complete as the Clerk's Transcripts. Likewise the docket sheets from the California Supreme Court on appellant's initial appeal in *People v. Phillips*, No. S004320/Crim.21374, and his pending appeal in *People v. Phillips*, No. S025880, show what has transpired during the pendency of the state appeals, as do the documents filed in the Madera County Superior Court regarding appellant's request for correction of the record on that pending state appeal.

The official record of the parallel state case is a proper object for judicial notice on the appeal of an

abstention order. *Lumen Const. Inc. v. Brant Const. Co. Inc.*, 780 F.2d 691, 697 fn 4 (7th Cir. 1985).

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks that the Motion to Lodge Documents be granted.

Dated: July 24, 1995.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

EDMUND D. McMURRAY
Supervising Deputy Attorney General
State Bar No. 42985

Attorneys for Respondent

EDM:msd

DECLARATION OF SERVICE BY MAIL

Re: Phillips v. Vasquez **No. 92-1528**

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

MOTION TO LODGE DOCUMENTS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
Attorney at Law
43033 Glacier Lane
Coarsegold, CA 93614

Daniel B. Vasquez, Warden
California State Prison
San Quentin, Ca 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, CA 94964

Each said envelope was then, on July 24, 1995, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 24, 1995, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
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(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Z

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
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P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

LETTERHEAD

DONALD J. HORVATH
Attorney at Law
43033 Glacier Lane
Coarsegold, Ca 93614

Phone and FAX:
(209) 658-7048

22 July 1995

Ninth Circuit Court of Appeals
Cathy Catterson, Clerk
P.O. Box 193939
San Francisco, CA 94119-3939

RE: Richard Phillips on habeas corpus; 92-15828

Dear Ms. Catterson:

This is a reply to attorney Edmund McMurray's letter dated 18 July 1995 and "NOTICE OF LODGING" which I received on 21 July 1995.

Please bring this letter to the attention of the court.

Appellant Phillips objects to this court's consideration of the documents sent by appellee to this court without request from the court and without a formal motion to include the lodged documents in the record on appeal. Appellant further requests that the lodged documents immediately be returned to appellee.

Rule 10 of the Rules of appellate Procedure provides:

> "(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."

None of the documents lodged by appellee were filed in the district court. Therefore, none of the documents lodged by appellee properly may be included in the record on appeal.

As Item 11 of the lodged documents, appellee has sent this court a copy of its statement of the case in the state penalty appeal. However, appellee did not send appellant or me this document; neither appellant nor I have seen this document.[1]

Appellee's attempt to change the record on appeal after appellant filed his reply to the petition for rehearing should be denied upon the ground that appellee's request is very, very late.

Appellee was aware when it filed the petition for rehearing that the petition was grounded upon alleged facts outside of the record on appeal (Petition for Rehearing, footnote 1.) At latest, appellee's attempt to correct the record problem should have

---

[1] Although Mr. McMurray mentions a statement of acts on direct appeal in his letter, it appears that only the statement of case was sent to this court--it would, of course, be very improper and prejudicial for appellee to send this court its version of the facts. Since I don't have the document submitted, I cannot assess whether appellee's statement of the case says anything which is untrue or prejudicial to appellant.

been made when or shortly after the petition for rehearing was filed. A timely request would have allowed appellant an opportunity to respond. Instead, appellee waited until shortly before appellant's reply to the petition was due on 28 July 1995 (and after it actually was filed) to submit improper documents for consideration by this court.

Sincerely yours,

/s/

DONALD J. HORVATH

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age, and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

HORVATH'S LETTER OF 22 JULY 1995 TO MS. CATTERSON

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 22 July 1995, sealed and deposited in the United States mail at Coarsegold, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 22 July 1995 at Coarsegold, California.

Donald J. Horvath

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

APPENDIX AA

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Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(FILED JUL 31 1995, Cathy A. Catterson, Clerk, U.S. Court of Appeals)

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, Warden San Quentin State Prison Respondent and Appellee.	Case No. 92-15828

On Appeal from the United States District Court for the Eastern district of California
No. CV-F-92-5167-REC-P

OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

RICHARD L.A. PHILLIPS
Proceeding *pro se*
C-13707 3-E-111
San Quentin, CA 94964

DONALD J. HORVATH, Esq.
Advisory Counsel by
Appointment of the Court
43033 Glacier Lane
Coarsegold, Ca 93614

Tel: (209) 658-7048

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DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
P.O. Box C-13707
San Quentin, Ca 94964

DONALD J. HORVATH, Esq.
Advisory Counsel by
Appointment of the Court
43033 Glacier Lane
Coarsegold, Ca 93614

(209) 658-7048

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS Petitioner and Appellant, vs. A. CALDERON, * Warden, San Quentin State Prison Respondent and Appellee.	Case No. 92-15828 OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Appellant RICHARD LOUIS ARNOLD PHILLIPS respectfully submits the following OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS, to supplement the State of California's Motion

for Rehearing and Suggestion for Rehearing En Banc.

*Mr. Arthur Calderon has succeeded Daniel B. Vasquez as Warden of San Quentin State Prison, and is substituted as opposing party pursuant to Federal Rules of Appellate Procedure 43 (c).

I.

BACKGROUND

Sometime between the 11 October 1994 oral arguments in the case at bar, and the issuance of the Opinion, filed 26 May 1995, an-unidentified male representing himself as a clerk of this Court, called the California Attorney General's office. This Clerk requested several dockets for various state courts pertaining to the Phillips (Appellant) case. After apparently encountering difficulty in obtaining what he was looking for, this Clerk then called Phillips' advisory counsel Donald Horvath and made the same request. Mr. Horvath promptly provided the requested dockets.

On or about 7 June 1995 (dated 6 June 1995) the Attorney General for the State of California (Appellee) filed a Petition for Rehearing and Suggestion for Rehearing En Banc.

On 30 June 1995 the Court issued an

Order to Phillips and advisory counsel Horvath, directing that a response to the Petition for Rehearing and Suggestion for Rehearing En Banc be filed by 28 July 1995.

On 19 July 1995 both Phillips and Horvath separately filed responses.

On or about 21 July 1995 (dated 18 July 1995) Appellee filed a Notice of Lodging; and a letter to Ms. Catterson, Clerk of this Court. Appellee lodged seven (7) volumes of Clerk's Transcripts from Madera County Superior Court No. 4852, and apparently a segment of his work product alleged to be his Statement of the Case for the pending second automatic appeal of the penalty retrial before the California Supreme Court. (No copy of the aforementioned were provided to either Phillips or Horvath.)

On 24 July 1995 Advisory Counsel Horvath filed a Letter Brief objecting to the Notice of Lodging; and document(s) referred to in the letter to Ms. Catterson.

On or about 26 July 1995 (dated 24 July 1995) Appellee filed a Motion to Lodge Documents.

II.

DISCUSSION

1. The Clerk's Transcripts

The facts of the entire case, inclusive of delays in state proceedings, are pleaded before the district court in Phillips' writ of habeas. This writ is part of the record transferred-to this Court. The California Attorney General attempts to make fn 4 of *Lumen Const. Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691 697 (7th Cir. 1985) reach to the instant case as reason why the Court should review the trial Clerk's transcripts. Phillips argues this Court should not for the following reasons. In *Lumen* there were city agencies, building contractors, sub-contractors, etc. The following gives an idea of that litigation:

...Region Management filed claims with

> Valparaiso for amounts allegedly owing from Lumen. In response, Valparaiso withheld payments due to Brant, and Brant in turn withheld payments from Lumen... Brant filed an interpleader action... A week later, Lumen... filed a second state court suit... naming Brant as a defendant... In addition, Lumen filed claims against Brant with Valparaiso. Meanwhile, Region Management and defendant-appellee United States Fidelity & Guarantee Company ("Fidelity") filed various claims, counterclaims, and cross-claims in the original interpleader suit. g ...Lumen filed its answers to the claims raised by Brant, Region Management, and Fidelity and also filed its "Counterclaim, Cross-Claim and Third-Party Complaint." *Lumen, supra* at 693.

Lumen, "By a virtually identical document filed in the district court on the same day, Lumen initiated the instant federal action. *Lumen, supra* at 693 This created a concurrent jurisdiction problem which does not exist in the case at bar.

In addition, the documents transferred to the appeals court were "principally... copies of state court pleadings and orders . . . not in the record of the district court.... the official record of the parallel state case is a proper object

for Judicial notice." *Lumen, supra* at 697 fn 4.

In the case at bar, there is only one petitioner, with one writ and one opposition. Further, the instant case is distinguished from *Lemun* (a) because *Lemun* has nothing to do with writ of habeas, or criminal cases; and (b) because the case at bar has no "parallel state case."

NOTHING in the Clerk's transcripts speaks in any way to the relevant questions: Has Phillips fully exhausted as to state review, all issues contained in the writ before the district court? Is the issues in this writ now ripe for federal review?

If ever there was an issue that should be reviewed under the doctrine of "first impression," this is it. The California Attorney General has dumped seven (7) volumes of a county clerk's transcripts on the lap of this Court and essentially said, "Here's a stack of papers. Look through these,

second-guess the state trial court, and see if you can find something that was frivolous or for purpose of delay." OF NOTE is the fact Appellee has not pointed to a single issue in seven (7) volumes of clerk's transcripts for an example of alleged delay.

Unless and until such time as this Court is prepared to go through each and every page, filing, document, and call for the transcript of each actual proceedings, reviewing every packet of *in camera* proceedings sealed by the trial court, these trial clerk's transcripts should be returned and the Motion to Lodge denied.

2. Statement of the Case

Although not included in-the Motion for Lodging, in the Attorney Generals 18 July 1995 letter to Ms. Catterson, Clerk of this Court, Appellee states he is including what amounts to a print-out of some of his work product he has entitled Statement of the Case. This is apparently to show: (a)

Appellee is diligently working on this case; or (b) an attempt to further muddy the waters and perhaps prejudice Phillips.

In either event, this print-out of work product was completed before the record of the retrial of the second prong in this bifurcated case is even corrected and certified by the trial court. This alleged Statement of the Case is in no way a part of the record on appeal and should be rejected and immediately returned to the Attorney General, without review.

III.

CONCLUSION

Appellee has not provided this Court with a single example, from the Clerk's transcripts or any other transcripts, of the trial court finding Phillips did not comport himself as a-n officer of the court in good standing.

Appellee has not provided a single example in the Clerk's transcripts or any

other transcripts, of the trial court or any state court finding Phillips was filing a frivolous motion, or acting for purpose of delay.

Appellee has failed to show Phillips was not entitled, indeed invited, to fully litigate guilt issues while at the same time preparing for retrial of the second prong of this bifurcated case.

Appellee has not offered any proof as to why his personal work product should be reviewed by this Court.

The Motion to Lodge should be denied.

DATED: 27 July 1995

/s/
RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se* with
advisory counsel

CERTIFICATE OF SERVICE

RICHARD L.A. PHILLIPS Petitioner, vs. ARTHUR CALDERON, Warden Defendant.	)	Case No. 92-15828

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

C-13707 3-E-111
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

OBJECTION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin, California, per the restrictions of San Quentin State Prison, concerning inmate

delivery to correctional authorities of outgoing legal mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244

A. CALDERON, Warden
San quentin State Prison
San Quentin, Ca 94964

I declare under penalty of perjury that the foregoing is true and correct; and that this was executed on the 27th day of July, 1995 in San Quentin, California.

/s/
RICHARD L.A. PHILLIPS
Pro se with advisory counsel

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

APPENDIX BB

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.

_____/

On Appeal From the United States
District Court
For The Eastern District of
California
No. CIV-F-92-5167-REC-P

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

Donald J. Horvath #53777
43033 Glacier Lane
Coarsegold, California 93614

Phone: (209) 658-7048

Advisory Counsel for
Appellant Richard Phillips

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS, No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.
_____/

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

ARGUMENT

1. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED BECAUSE THE STATED GROUNDS FOR THE MOTION ARE FALSE.

In support of its motion for judicial notice, appellee says:

> "[T]he record presently before this court is practically nonexistent. It does not contain an accurate account of what went on in the State court proceedings of appellant's initial state capital appeal and his retrial of the penalty phase following reversal by the California Supreme Court. (Motion, p.

This simply is not true.

The record before this court includes the habeas corpus petition which was filed in the district court and dismissed by that court. The issue of whether the district court erred in dismissing the habeas corpus petition should be decided upon the record before the district court--i.e., upon the facts well pleaded and presented in appellant's habeas corpus petition.

To the extent that extraordinary delay in state court proceedings is material to this court's decision, the facts pleaded in the habeas corpus petition are sufficient to establish such extraordinary delay. habeas Corpus Petition, pp. 1-14.)

Appellee asserts in its motion that the present record does not contain "an accurate account" of state court proceedings. However, appellee has failed to show or even attempt to show that any fact regarding state court proceedings pleaded in appellant's habeas corpus petition (the present record) is not

accurate.

2. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED UPON THE GROUND THAT APPELLEE HAS FAILED TO SHOW THAT THE DOCUMENTS TO BE NOTICED ARE RELEVANT TO ANY ISSUE BEFORE THIS COURT.

As urged in Horvath's Reply To The Petition For Rehearing, the reasons for the past delay in state court proceedings are not relevant to the majority opinion. (Horvath Reply, Points 1, 2-B, and 2-C, pp. 1-2, 8-10.) In short, the past delay does not disappear upon a conclusion that appellant caused some of the delay; therefore, the balance of jurisprudential concerns against appellant's right to attack the constitutional validity of his conviction discussed by the majority does not change. Appellant has been granted a statutory right to proceed upon his petition which resolves the issue before this court in his favor. (28 U.S.C. § 2254.)

Although a conclusion that appellant

caused the delay in state court proceedings would be relevant to Justice Kleinfeld's concurring opinion, appellee has failed to show that the documents to be noticed establish that appellant is responsible for such delay. As urged in Horvath's Reply To The Petition For Rehearing, appellant had a right to litigate important issues in state court and cannot be held responsible for the resulting delay absent a showing that his pleadings are frivolous and, therefore, should not have been filed. (Horvath Reply, Point 2-A, pp. 2-8.)

Appellee has failed to show or attempt to show that the documents to be noticed include motions or other pleadings filed by appellant which are frivolous, and, therefore, support an inference that such pleadings were filed for purposes of delay. Therefore, appellee also has failed to establish that the documents to be noticed

are relevant to Justice Kleinfeld's opinion.[1]

3. APPELLEE'S REQUEST THAT THIS COURT TAKE JUDICIAL NOTICE OF DOCUMENTS PREVIOUSLY LODGED SHOULD BE DENIED UPON THE GROUND THAT THE REQUEST IS UNTIMELY.

Appellee previously lodged documents with this court without request of the court and without a formal motion.

By letter to the court dated 22 July 1995, attorney Horvath objected to appellee just sending documents to the court in this manner upon the grounds (1) that pursuant to Rule 10 of the Rules of Appellate Procedure the lodged documents could not properly be included in the record on appeal and (2) appellee's attempt to change the record on

---

[1] 1. If this court takes judicial notice of several volumes of state court documents as requested by appellee without such a showing, the burden would fall upon this court to review hundreds of state court motions and pleadings to determine whether appellant properly litigated issues in state court or improperly filed papers for purposes of delay.

appeal was untimely.

A copy of this letter was served by mail upon appellee.

In his letter of 22 July 1995, Horvath stated:

> "Appellee's attempt to Change the record on appeal after appellant filed his reply to the petition for rehearing should be denied upon the ground that appellee's request is very, very late.
>
> "Appellee was aware when it filed the petition for rehearing that the petition was grounded upon alleged facts outside of the record on appeal. (Petition for Rehearing, footnote 1.) At latest, appellee's attempt to correct the record problem should have been made when or shortly after the petition for rehearing was filed. A timely request would have allowed appellant an Opportunity to respond. Instead, appellee waited until shortly before appellant s reply to the petition was due on 28 July 1995 (and after it actually was filed) to submit improper documents for consideration by this court."

Although well aware of the issue, appellee's motion does address or attempt to justify making this request for judicial

notice so very late in the proceedings before this court.

4. IN ANY EVENT, APPELLEE'S MOTION TO LODGE ITS UNFILED STATEMENT OF THE CASE IN THE STATE PENALTY APPEAL SHOULD BE DENIED.

Appellee previously lodged as Item 11 a copy of its draft statement of the case in the state penalty appeal. This document has not been filed in the California Supreme Court and a copy thereof has not been served upon appellant or attorney Horvath.

In the present motion, appellee for the first time indicates that it wants this court to take judicial notice of the lodged documents. In support of this request, appellee says, "The official record of the parallel state case is a proper object for judicial notice on the appeal of an abstention order." (Motion, p. 2.)

Appellee's draft statement of the case upon penalty appeal is not a part of the official state record since it has not been filed in any court. Therefore judicial notice

of this document is improper upon the face of the argument urged by appellee.

Upon this additional ground, judicial notice of Item 11 is improper. This document should immediately be returned to appellee without consideration by the court.

If this court decides to take judicial notice of Item 11, appellee should be ordered immediately to serve a copy of its unfiled statement of the case upon appellant and attorney Horvath. Appellant is entitled to have a copy of the record on appeal, including any matter judicially noticed. Since appellee knew appellant and Horvath did not have a copy of this document appellee should have served this document upon appellant and his advisory counsel in the first instance.

CONCLUSION

Appellee's request that this court take judicial notice of previously lodged documents should be denied and the lodged documents should immediately be returned to appellee.

Appellant Richard Phillips respectfully so prays.

DATED: 27 July 1995

Respectfully submitted,

/s/
Donald J. Horvath
Advisory Counsel For
Appellant Phillips

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez
No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age and not a party to the within cause; my business address is 43033 Glacier Lane, Coarsegold, CA 93614. I served a true copy of the attached

OPPOSITION TO APPELLEE'S MOTION TO LODGE DOCUMENTS

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on 27 July 1995 at Coarsegold, California.

Donald J. Horvath